No. 01-807

In the
Supreme Court of the United States

PHEASANT BRIDGE CORP.,

Petitioner,

v.

THE TOWNSHIP OF WARREN,

Respondent.

Supreme Court, U.S.
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On Petition For Writ Of Certiorari
To The Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a land use regulation that does not bear any real and substantial relationship to the ostensible purposes of zoning, as applied to a particular property, fail to substantially advance a legitimate state interest as to that property and thus constitute a taking of that property so as to require the payment of just compensation under the Takings Clause of the Fifth Amendment, without regard to the economic impact of the regulation?

2. Is a property owner entitled to just compensation under the Takings Clause of the Fifth Amendment for a temporary taking of property between the enactment of a land use regulation and a subsequent judicial declaration that, as applied to such property, it fails to substantially advance legitimate state interests?

PARTIES TO THE PROCEEDINGS

Petitioner is a nongovernmental corporation. There are no parent corporations or publicly held companies owning 10% or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Pheasant Bridge Corp. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 169 N.J. 282, 777 A.2d 334 (2001); it appears at page 1 of the Petition Appendix (Pet. App. 1).

The opinions of the other courts below are not reported:

The initial opinion and judgment of the Superior Court of New Jersey, Law Division, Somerset County, which dismissed petitioner's complaint, are reproduced at Pet. App. 22 and Pet. App. 32 respectively.

The initial opinion and judgment of the Superior Court of New Jersey, Appellate Division, affirming that judgment on petitioner's appeal appears at Pet. App. 34. The Appellate Division's order granting petitioner's motion for reconsideration and withdrawing its initial opinion is reproduced at Pet. App. 38. The Appellate Division's substitute opinion and judgment affirming in part and remanding the matter to the Law Division is reproduced at Pet. App. 40.

The Law Division's several opinions on remand are reproduced at Pet. App. 44 (taking), Pet. App. 62 ("as applied" challenge) and Pet. App. 71 (counsel fees). The final judgment is reproduced at Pet. App. 75. The Law Division's order staying its judgment pending appeal is reproduced at Pet. App. 79.

The Appellate Division's opinion and judgment on the Township's appeal is reproduced at Pet. App. 81.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on August 2, 2001. Pet. App. 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

ORDINANCE PROVISIONS AT ISSUE

The relevant portions of Warren Township Ordinance 93-24 with regard to the EP-250 zone are reproduced at Pet. App. 91.

STATEMENT OF THE CASE

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court stated that a land use regulation constitutes a taking if it either substantially deprives a property owner of all beneficial use of its property or, as applied to particular property, fails to substantially advance a legitimate state interest. Despite finding that the challenged ordinance here

did not rationally advance state interests [and hence cannot *substantially* advance those interests], the Supreme Court of New Jersey completely ignored the statement in *Agins* [to the point of not even citing the opinion] and held that petitioner had no cognizable takings claim.

A. Factual Background

Petitioner is the owner of a tract of land almost 29 acres in size located in the Township of Warren, Somerset County, New Jersey. Pet. App. 2, 169 N.J. at 286, 777 A.2d at 336. The property is located at the end of Mary Street which had previously been developed with single family homes. Prior to the adoption of Ordinance 93-24 by the Township, petitioner's property and the adjacent Mary Street development were placed in zones which permitted single-family residential development on lots at least 1½ acres in size. In order to develop its property, petitioner had to obtain sewer capacity from the Township's Sewerage Authority. Petitioner was ultimately able to do this as the result of litigation against the Authority and the payment of $42,000 toward a fund to be utilized by the Authority to complete a study of existing and prospective sewer capacity within the sewer service area in which the property was located. Pet. App. 2, 169 N.J. at 286, 777 A.2d at 337.

Upon completion of that study petitioner was allocated a sufficient portion of the additional determined capacity to enable it to begin to process its subdivision application. However, before the subdivision process could be completed, the Township adopted Ordinance 93-24. Pet. App. 3, 169 N.J. at 287, 777 A.2d at 337. That ordinance created a new "environmental protection" zone, designated EP-250, with a minimum lot size of six acres, into which petitioner's property was placed. Pet. App. 4, 169 N.J. at 287, 777 A.2d at 337. The 1½ acre minimum lot size applicable to

the preceding length of Mary Street was not changed. *See* Pet. App. 14, 169 N.J. at 294, 777 A.2d at 341.

The EP-250 zone was created pursuant to the recommendation of the Township's Planning Board as articulated in a master plan adopted in 1990.[1] The master plan asserted that there were a number of environmental constraints against development within what became the EP-250 zone which justified the increased minimum lot size. According to the master plan these primary constraints were

> Open water;
> 0-1 foot depth to seasonal high table water;
> Wetlands and wetlands buffers;
> Steep slopes (over 19%);
> 100 and 500 year flood plains.

Pet. App. 2 – 3, 169 N.J. at 287, 777 A.2d at 337. Part of the reason cited in the master plan for the impact of the environmental constraints was the inability to install individual septic systems. Pet. App. 9, 169 N.J. at 292, 777 A.2d at 340.

At trial petitioner presented evidence that these factors were either not present on its property or inapplicable due to petitioner's obtaining of sewer capacity or, in the case of wetlands, preempted by state law. Pet. App. 9 – 10, 169 N.J. at 291-293, 777 A.2d at 340-341.

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[1] New Jersey has delegated zoning power to municipalities under the Municipal Land Use Law, N.J.S.A. 40:55D-1 *et seq.* The power to zone may only be exercised by a municipality's governing body after its planning board has adopted the land use element of a master plan. If the zoning ordinance is not substantially consistent with and designed to effectuate the land use element of the master plan, the governing body must adopt a resolution identifying and justifying the departures and adopt the zoning ordinance by affirmative vote of the majority of its full authorized membership. N.J.S.A. 40:55D-62a. Accordingly, the master plan is significant evidence of the purpose of a zoning ordinance.

B. Judicial Proceedings

After the passage of Ordinance 93-24, petitioner filed a timely action in lieu of prerogative writs in the Superior Court of New Jersey, Law Division, Somerset County (the "Law Division") alleging that the minimum lot size provision of the EP-250 zone created by Ordinance 93-24 was invalid facially and as applied and constituted a regulatory taking of its property for which compensation must be provided.[2]

After a plenary hearing the trial court upheld Ordinance 93-24 against the facial challenge. The court, reasoning that the petitioner should seek an administrative remedy, did not rule on the "as applied" challenge or takings claim. Pet. App. 22.

Petitioner appealed to the Superior Court of New Jersey, Appellate Division (the "Appellate Division"). In its initial opinion (Pet. App. 34) the Appellate Division affirmed the Law Division's judgment. Thereafter that court granted petitioner's motion for reconsideration (Pet. App. 38), and issued a substitute opinion ruling that a variance application was not an administrative remedy that petitioner had to exhaust before a ruling could be sought on the petitioner's "as applied" challenge or takings claim. Pet. App. 40. The matter was remanded to the Law Division for adjudication of

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[2]In the courts below petitioner cited the Fifth Amendment (made applicable to the states by the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897)) and article I, paragraph 20 of the New Jersey Constitution of 1947. Although as pled in the complaint the takings claim was based upon the economic impact of the ordinance, the trial of the matter and all subsequent arguments proceeded upon the theory that the ordinance constituted a taking under the "substantial advancement" test of *Agins*. This *de facto* amendment of the pleadings was acknowledged by the trial court when it granted petitioner's motion for post-trial amendment of the pleadings to conform to the evidence with regard to the counsel fee issue. *See* Pet. App. 73 (opinion) and Pet. App. 77 (final judgment).

the "as applied" challenge and "whether plaintiff proved that the EP-250 zone did not substantially advance a legitimate state interest and thus effect[ed] a taking." Pet. App. 42.

On remand the Law Division, relying upon *Agins*, determined that, as applied to the petitioner's property, the EP-250 zoning failed to substantially advance a legitimate state interest and was therefore a taking for which compensation had to be paid for the period during which the zoning was in effect. Pet. App. 44. By separate opinion subsequently issued, the court also determined that, as applied to petitioner's property, the EP-250 zoning was arbitrary, capricious and unreasonable and the court declared it invalid. Pet. App. 62. Finally, the Law Division, in a third separate opinion, made an award of counsel fees to the petitioner under 42 U.S.C. § 1988. Pet. App. 71. A final judgment incorporating these separate rulings was entered on July 16, 1998. Pet. App. 75. The Law Division stayed its judgment pending the Township's appeal. Pet. App. 79.

On appeal by the Township, the Appellate Division reversed the judgment of the Law Division, determining that the EP-250 zoning was not a taking and, because it was consistent with the Township's master plan, was valid. Pet. App. 81.

The Supreme Court of New Jersey granted certification to review the Appellate Division's judgement. 165 N.J. 489, 758 A.2d 648 (2000). The New Jersey Supreme Court reversed the Appellate Division's ruling on the "as applied" challenge, holding that the petitioner had "met its burden by affirmatively demonstrating that the ordinance, as to its property, did not bear any 'real and substantial' relationship to the ostensible purposes of the zoning provision." Pet. App. 12, 169 N.J. at 294, 777 A.2d at 342. The court further determined that the petitioner was not required to pursue any variance relief from the six acre minimum lot area

standard. Pet. App. 12, 169 N.J. at 294, 777 A.2d at 341. However, in a discussion that did not cite, much less justify departing from, *Agins*, the court affirmed the dismissal of the takings claim. Pet. App. 14 – 20, 169 N.J. at 295-301, 777 A.2d at 343-345.

Pheasant Bridge Corp. timely files this petition for certiorari to review the decision of the Supreme Court of New Jersey holding that petitioner has no cognizable takings claim.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE NEW JERSEY SUPREME COURT CONFLICTS WITH THE DECISION OF THIS COURT IN *AGINS* AND DECISIONS OF UNITED STATES COURTS OF APPEALS FOR THE NINTH AND TENTH CIRCUITS AND SEVERAL STATE COURTS APPLYING THAT CASE.

This Court has long recognized that government regulations can have so great an impact upon particular property owners that such regulations constitute a "taking" of the particular property requiring the payment of just compensation. "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

To date this Court has not fully detailed all the circumstances in which regulation will amount to a compensable taking, but some bright line rules have been expressed. Regulations which require permanent physical occupation are a per se taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Also, in *Agins v. City of Tiburon*, 447 U.S. at 260, this Court stated:

> The application of a general zoning law to particular property effects a taking if the

> ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.

The disjunctive, rather than conjunctive, nature of this test is made clear by *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1993), where the regulation at issue admittedly advanced a legitimate public purpose, but also deprived the land owner of all beneficial economic use of the property. This Court found that the deprivation of all economic use was sufficient to constitute a taking, unless on remand it was determined that under background principles of state law the petitioner in that case never had the right to build.

To date, this Court has not had the occasion specifically to consider a taking based solely upon the "substantial advancement" prong of *Agins*, although there has been some discussion of that test. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 843 n. 1 (1987), Justice Brennan's dissent argued that the "substantially advance" language in Agins was merely a minor difference in phraseology and that the inquiry was merely one of reasonableness. The Court squarely rejected this position:

> Contrary to Justice Brennan's claim, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' that the measure adopted might

> achieve the State's objective.[3] . . . [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges and First Amendment challenges are identical.

483 U.S. at 834 n. 3 emphasis in original, citations omitted.

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), this Court considered whether the Seventh Amendment provides a right to a trial by jury in an action under 42 U.S.C. § 1983 brought in federal court in the absence of any state law remedy for a temporary regulatory taking. The trial court had submitted the case to a jury with instructions to find for the plaintiff "if it found either that Del Monte Dunes had been denied all economically viable use of its property or that 'the city's decision to reject the plaintiff's 190 unit development proposal did not substantially advance a legitimate public purpose.'" 526 U.S. at 700. This Court's opinion generally approved of the jury instructions as being "consistent with our previous general discussions of regulatory takings liability," and cited, in part, to *Agins*. 526 U.S. at 704.

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[3]This case does not require a more definitive resolution of that question because whatever may be the difference between the substantial advancement and rational basis tests, the former is surely no less strict than the latter and in this case the ordinance at issue, as applied to petitioner's property, has been found to be arbitrary, capricious and unreasonable, that is, irrational.

Until the present case it had seemed that the New Jersey Supreme Court also recognized this rule. In *Littman v. Gimello*, 115 N.J. 154, 161, 557 A.2d 314, 317-18, cert. den., 493 U.S. 934 (1989), decided after *Agins* and *Nollan*, that court held that the federal constitutional protections under the takings clause and those under the cognate state constitutional provision, N.J. Const. (1947), art. I, ¶ 20, were "coextensive." (This holding is even repeated in the New Jersey Supreme Court's opinion in this very case. Pet. App. 14, 169 N.J. at 296, 777 A.2d at 343.) Even more clearly, in *Gardner v. N.J. Pinelands Commission*, 125 N.J. 193, 205, 593 A.2d 251, 257 (1991) (citing *Agins*), the New Jersey Supreme Court declared:

> In its most general formulation, takings analysis makes *two* fundamental demands of any zoning scheme: it must substantially advance legitimate state interests, *and* it cannot deny an owner all economically viable use of the land. [emphasis added]

Thus, until the present case there was every reason to believe that New Jersey's courts would recognize a taking if a land use regulation did not substantially advance a legitimate state interest.

Other federal courts have, albeit rarely, analyzed regulations under the substantial advancement test to determine if they constituted a taking requiring just compensation. Such cases have arisen from the Ninth and Tenth Circuits. In *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995), landowners challenged Wyoming's scheme for allocating hunting licenses and in particular the limit of big game licenses for the owners of large tracts of land to two such licenses regardless of how large the tract. After dismissing the commerce clause challenge and the takings claim based upon deprivation of all economically

beneficial use, the court proceeded to discuss the substantial advancement test:

> Even if [the regulation at issue] does not completely deprive Plaintiffs of all economically beneficial use of their property, it still could constitute a taking if it failed substantially to advance a legitimate governmental interest. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

[70 F.3d at 1578.]

The substantial advancement test has been cited more frequently in the Ninth Circuit. The jury instructions in *Del Monte Dunes* (which arose from a district court within that circuit) have already been mentioned. Another such case from the Ninth Circuit is *Buckles v. King County*, 191 F.3d 1127 (9th Cir. 1999), where a property owner challenged a zoning regulation which returned the property to the residential use designation which had applied for all but a small portion of the prior twenty years. The property owner conceded that the residential designation did not destroy substantially all economic use, but that concession did not end the inquiry. The court also analyzed the regulation under the substantial advancement test, but found no taking under that test

The substantial advancement test has also been applied by the courts of New York, Massachusetts and California.

The New York Court of Appeals recognized that *Agins* set forth two disjunctive tests in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989), *cert.* denied, 493 U.S. 976 (1989). According to that court, a regulation of private property will "without more, constitute a taking: (1) if it denies an owner economically viable use of his property, *or* (2) if it does not substantially

advance legitimate State interests." 74 N.Y.2d at 107, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548 (emphasis in original). The court later described the latter standard as "the other threshold test." 74 N.Y.2d at 111, 542 N.E.2d at 1068, 544 N.Y.S.2d 551.

In *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 392, 643 N.E.2d 479, 482, 618 N.Y.S.2d 857, 860 (1994), *cert.* denied 514 U.S. 1109 (1995), the New York Court of Appeals, relying upon the language of *Seawall Associates* quoted above, stated: "Failure to measure up to either criterion can invalidate a governmental incursion or encumbrance on private property rights."[4]

In *Lopes v. City of Peabody*, 417 Mass. 299, 305, 629 N.E.2d 1312, 1315-16 (1994), the Supreme Judicial Court of Massachusetts, on remand from this Court in light of *Lucas*, noted that if the ordinance at issue deprived the land of economically beneficial use, it "may be upheld only if it substantially advances legitimate State interests and its application to the Lopes land reflects established principles of State property and nuisance law."

The Court of Appeal of California, in *152 Valparaiso Associates v. City of Cotati*, 56 Cal. App. 4th 378, 384, 65 Cal. Rptr. 2d 551, 555 (1997), also emphasized the "or" when it quoted the relevant language of *Agins* and explicitly eschewed the need for proof of economic impact when analyzing a regulation under the substantial advancement test:

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[4]In both the *Seawall Associates* and *Manocherian* opinions, the stated result of a finding of taking was invalidation. New York's continued acceptance of the substantial advancement test is now questionable in light of *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 721 N.E.2d 971, 699 N.Y.S.2d 721 (1999), *cert.* denied, 529 U.S. 1094 (2000).

> Under the so-called *Nollan/Dolan* test, which also stems from the language of *Agins*, a property owner may challenge a regulatory taking if it does not advance a legitimate state interest, even if the taking does not deprive the property owner of *all* economically viable use of the property. [emphasis in original]

The only federal case of which the petitioner is aware which found a regulation to fail the substantial advancement test is *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997). In that matter property owners challenged a rent control ordinance which limited the renegotiation of ground rent charged for residential condominium units for the ostensible purpose of providing more affordable housing. The court found that the regulation did not substantially advance this purpose because the owner-occupant of a condominium unit could sell the unit without regulation as to price to a subsequent owner-occupant and the rent restriction as to the ground lease would continue. Thus, as plaintiffs argued and the court found, the rent control ordinance would increase the value of the condominium owner's interest at the expense of the ground owner, but would not result in more affordable prices for housing. The court found the rent control ordinance unconstitutional in that it failed to substantially advance a legitimate state interest. The published opinion, however, does not indicate the remedy.

The opinion of the New Jersey Supreme Court in this case omitted entirely any mention of the *Agins* case and petitioner's claim based upon the substantial advancement test. (Indeed, the opinion contends that petitioner's argument was merely that the ordinance deprived it of the most profitable use of its property, an inaccurate portrayal as the case, as presented at trial and on appeal, was based upon the failure of the ordinance to substantially advance a

legitimate state interest and not the economic impact as formally pleaded in the complaint prior to the post-trial amendment to conform to the evidence.)

The Appellate Division opinion, at least, cited the relevant passage from *Agins* and openly denied that failure of the regulation to substantially advance a state interest would be a taking, limiting the remedy to invalidation of the ordinance. Pet. App. 84.

This Court should grant certiorari to resolve the conflict between the Supreme Court of New Jersey and the United States Courts of Appeals for the Ninth and Tenth Circuits and the courts of New York, Massachusetts and California over the substantial advancement test of *Agins* and to confirm that the remedy for a regulatory taking is just compensation.

B. THE DECISION OF THE NEW JERSEY SUPREME COURT CONFLICTS WITH THE DECISION OF THIS COURT IN *FIRST ENGLISH* AS TO THE AVAILABILITY OF JUST COMPENSATION FOR A TEMPORARY REGULATORY TAKING.

In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court reviewed a decision by the California Court of Appeal which it perceived reflected a rule that compensation in the event of a regulatory taking was only available after the property owner secured a ruling in an action for declaratory relief or mandamus and then only if the governmental entity elected to keep the regulation in place. This Court rejected that view and held: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321.

The New Jersey Supreme Court's opinion in this case limits the temporary taking remedy to those cases where the regulation is valid, not to cases, such as here, where the regulation is set aside as invalid. This position is directly contrary to the ruling of the United States Court of Appeals for the Ninth Circuit in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000), pet. for reh'g and reh'g *en banc* denied, 228 F.3d. 998 (9th Cir. 2000), *cert.* granted, 121 S. Ct. 2589 (2001). *Tahoe-Sierra* held that a temporary moratorium (even lasting for years) can never be a taking, but *Tahoe-Sierra* also recognized that *First English* did afford a temporary takings remedy in those cases where a regulation which effected a taking was subsequently invalidated. 216 F.3d at 778. The New Jersey Supreme Court here held that an invalid land use regulation cannot constitute a taking. Pet. App. 14, 169 N.J. at 296, 777 A.2d at 343.

If the New Jersey Supreme Court is correct in that subsequently invalidated ordinances cannot constitute temporary takings, then petitioner proved its case too well. There is no justification for allowing the Township of Warren to avoid liability just because the ordinance was so bad, as applied to petitioner's property, as to be irrational and thus invalid.

The New Jersey Supreme Court expressed concern that recognizing a temporary taking when the application of a zoning ordinance to a particular property was challenged "could have a chilling effect on land-use planning, for the adoption of an invalid ordinance could prove financially devastating to a municipality that was unsuccessful in its defense to a drawn-out constitutional challenge." Pet. App. 17, 169 N.J. at 298, 777 A.2d at344. Absent in this worry is a reciprocal concern for the impact upon the property owner of an ordinance ultimately found to be invalid.

Petitioner only seeks a ruling that where a regulation constitutes a taking entitling the property owner to just compensation that entitlement is not vitiated by limiting the remedy to an invalidation of the ordinance. The takings claim is not premised upon the invalidity of the ordinance and should not be defeated because a putatively valid ordinance is later found not to be.

From the property owner's perspective, at least under New Jersey law, the harm is no less in the case of an invalid ordinance than a valid ordinance constituting a taking (i.e., an ordinance rationally but not substantially advancing a legitimate state interest) which the government elects to rescind in order to avoid a permanent taking. Although the ordinance might have been declared invalid by the court, until that declaration was finally made, the ordinance enjoyed, under New Jersey law, a presumption of validity. *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 92 N.J. 158, 305, 456 A.2d 390, 466 (1983). Those bodies to which petitioner would have had to submit an application for development of the property, the Township's planning board or board of adjustment, would have had to apply the ordinance as written for they are without jurisdiction to pass upon its validity. *Fischer v. Township of Bedminster*, 5 N.J. 534, 542, 76 A.2d 673, 677 (1950).

The New Jersey Supreme Court found that *First English* did not apply, at least in part, because that case "did 'not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and like which are not before us.' *Id.* [482 U.S.] at 321, 107 *S. Ct.* at 2389, 96 *L. Ed.* 2d at 268." Pet. App. 16, 169 N.J. at 297, 777 A.2d at 344.

This is not a case where the taking is alleged to have occurred because of normal delay in, or protraction of, the administrative process. The taking arises from the adoption

of an ordinance which failed to substantially advance a legitimate state interest. As it happens, that ordinance was also found not rationally to advance a legitimate state interest and was invalidated on that basis, but whether it was a taking is independent of its validity. Under New Jersey law, there is no administrative process that petitioner could have used to obtain relief from the ordinance based upon the ultimately successful arguments as to its validity.[5]

Not only does the New Jersey Supreme Court seek to limit this Court's *First English* ruling to valid, rather than invalid, ordinances, but the court below also seeks to limit the application of *First English* to cases where the taking arises from the deprivation of all use. Although petitioner's takings claim is not based upon the denial of all use, there is no reason articulated by the court below why only that sort of temporary regulatory taking should require just compensation.

As the New Jersey Supreme Court itself noted, *First English* was concerned with the remedy available when a taking was found and not with whether government action amounted to a taking. Pet. App. 14, 169 N.J. at 297, 777 A.2d at 344. Yet, the principal basis of the New Jersey Supreme Court's finding that no taking occurred was derived from its understanding of *First English* (setting up the straw argument of reduction in profit) and without, as noted before, any discussion of the actual basis of that claim, the substantial advancement test set forth in *Agins v. City of Tiburon*.

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[5]The lack of an administrative remedy was recognized by the Appellate Division in its opinion remanding the matter to the trial court for rulings on the takings and as applied claims (Pet. App. 42 – 43) and by the New Jersey Supreme Court which found "no justification for requiring plaintiff [petitioner] to seek variance relief." Pet App. 12, 169 N.J. at 293, 777 A.2d at 341.

This Court should grant certiorari to review the New Jersey Supreme Court's improper limitation of the temporary taking remedy recognized in *First English*.

C. THIS CASE IS RIPE FOR ADJUDICATION BY THIS COURT.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court adopted a two-prong inquiry to determine if Fifth Amendment regulatory takings claims were "ripe" for adjudication. This Court stated that a takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," 473 U.S. at 186, and that the property owner must first seek and be denied compensation through whatever procedures the State provides. 473 U.S. at 194.

Logically, the first prong, a precise determination of the extent of permitted development is less necessary, if at all, where the takings claim is not based upon the economic impact of the regulation. As *Williamson County* noted, "Absent [such a determination] it is impossible to tell whether the land retained any reasonable beneficial use or whether respondent's expectation interests had been destroyed." 473 U.S. at 186, 190 n. 11. Those questions are not implicated in a substantial advancement claim.

Whether or not *Williamson County*'s first prong applies where the taking is predicated upon the failure of the regulation to substantially advance a legitimate state interest rather than its economic impact, petitioner meets both prongs of this ripeness test.

The maximum degree of permitted development is known with sufficient certainty. Petitioner's 29 acres can (as a matter of simple mathematics) produce at most four lots

which meet the six acre minimum size requirement. The state courts have determined that substantial variance relief to increase this lot yield is not available as a matter of state law. Accordingly, four lots is the maximum degree of development which would have been permitted under the ordinance.

This Court has often looked to state law to discern the permissible development in the absence of a final administrative determination. In *Lucas* this Court concluded that, at least for a portion of the period during which South Carolina's beach-front management regulations were in effect, state law provided no authority for the South Carolina Coastal Commission to grant an exception from the prohibition on construction and the subsequent amendment would provide no remedy for the pre-amendment deprivation. 505 U.S. at 1012-1013.[6] In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 735 (1997), this Court stated that the rationale of the court below that the petitioner had failed to obtain a final and authoritative decision was "unsupported by [its] precedents." The *Suitim* Court noted that the final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." 520 U.S. at 738. "Because the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying *Williamson County*'s requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel." 520 U.S. at 739. Just last Term, in *Palazzolo v. Rhode Island*, 533 U.S.

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[6] Similarly here, the New Jersey Supreme Court has invalidated the ordinance as to petitioner's property, so there is no remedy that could be granted at an administrative level for the pre-invalidation period. Any application at this point would be asking the land use agency to make an advisory opinion on what development would be permitted if the ordinance were still in effect as to petitioner's property.

___, (2001), this Court looked to Rhode Island's coastal resources management regulations to determine that no special exception could be granted. As the Court stated, "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." 533 U.S. at ___.

In this case the maximum extent of development, in terms of lot yield, is known because the Appellate Division determined that no variance could be granted (Pet. App. 36) and the New Jersey Supreme Court also found that it was not necessary for petitioner to pursue variance relief. Pet. App. 12, 169 N.J. at 294, 777 A.2d at 341.

Petitioner's request for compensation under state law procedures has been denied by the New Jersey Supreme Court. Thus, federal court intervention is not premature. *Palazzolo* proceeded as a review of a state supreme court decision denying compensation and did not require the commencement of a subsequent, separate action in federal court.

CONCLUSION

The petition for writ of certiorari should be granted. Ultimately this Court should determine that a temporary taking of petitioner's property was in effect from the enactment of Ordinance 93-24 until its final invalidation and remand the matter to the Supreme Court of New Jersey for further proceedings to determine just compensation due to the petitioner.

Although petitioner would prefer that this Court resolve the questions presented, in view of the failure of the Supreme Court of New Jersey to address the *Agins* decision and the conflict between the New Jersey Supreme Court 's decision and that of the United States Court of Appeals for the Ninth Circuit in *Tahoe-Sierra* regarding the application of *First English*, it would not be inappropriate to remand the matter to that court for reconsideration of its decision in light of *Agins* and this Court's ultimate disposition of *Tahoe-Sierra*.

Respectfully submitted,

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[APPENDIX A. OPINION AND JUDGMENT OF THE SUPREME COURT OF NEW JERSEY]

SUPREME COURT OF NEW JERSEY
A-138 September Term 1999

PHEASANT BRIDGE CORPORATION, a corporation of the State of New Jersey,

Plaintiff-Appellant,

v.

TOWNSHIP OF WARREN, in Somerset County, a municipal corporation of the State of New Jersey,

Defendant-Respondent.

Argued January 17, 2001 – Decided August 2, 2001

On certification to the Superior Court, Appellate Division.

Joseph E. Murray argued the cause for appellant (Joseph E. Murray & Associates, attorneys; Mr. Murray and Jay B. Bohn, on the briefs).

Timothy P. Beck argued the cause for respondent (DiFrancesco, Kunzman, Coley, Yospin, Bernstein & Bateman, attorneys).

The opinion of the Court was delivered by

LaVECCHIA, J.

The core issue in this appeal is whether a zoning ordinance increasing the minimum lot size for permitted residential development of an extensive tract of land along the northern perimeter of Warren Township ("Township") is valid as applied to plaintiff's property. Secondarily, the appeal

presents the question whether a taking of plaintiff's property has occurred irrespective of whether the ordinance is valid as applied. The trial court concluded that the zoning ordinance was arbitrary, capricious, and unreasonable as applied, and that a taking of property without compensation had occurred. The Appellate Division reversed on both issues. We granted certification, 165 N.J. 489 (2000), and now reinstate the trial court's determination invalidating the zoning ordinance because it is arbitrary, capricious, and unreasonable as applied to plaintiff's property. We hold further that plaintiff has no cognizable claim that it experienced a temporary taking during the period in which it successfully challenged the ordinance.

I.

In December 1986, plaintiff, Pheasant Bridge Corporation, purchased 28.98 acres of land in Warren Township zoned to permit single-family homes on a minimum lot size of one-and-one-half acres. That allowed plaintiff to enjoy a yield of eight to fifteen subdivided lots on its land. Starting in 1987, it sought to develop the property for residential subdivision in accordance with the existing ordinance. As a first step, plaintiff resolved an issue involving sewerage capacity for the development. A lawsuit against the local sewerage authority ultimately was settled after plaintiff paid $42,000 to secure participation in a reserved sewerage capacity program.

While plaintiff was pursuing development, the Warren Township Planning Board adopted a Town Master Plan in January 1990 that included a recommendation for the adoption of an environmental protection zone (EP-250) within the township. That zone included:

> Areas of significant (severe) economic constraints. . . . The unit yield shall be determined on non-environmentally

> constrained land at one unit per six acres. . . . Acres of accessible, and contiguous buildable uplands which are greater than 20 acres are considered appropriate for uses other than strictly large lot single-family residential or a hamlet. Appropriate conditional uses could consist of nursing homes, small scale retirement facilities, and recreation facilities for which additional density might be granted. Areas of severe environmental constraints should be preserved as undisturbed open space, although agricultural areas with significant wood lots (with a minimum of 50 acres) would be appropriate for golf courses or some other larger scale recreational use, provided that wooded areas are preserved to the greatest extent possible.
>
> The primary constraints found in this zone:
>
> Open water;
>
> 0-1 foot depth to seasonal high table water;
>
> Wetlands and wetlands buffers;
>
> Steep slopes (over 19%);
>
> 100 and 500 year flood plains.

In 1993, plaintiff sought subdivision approval, but the Township adopted an ordinance creating the EP-250 zone in December 1993 before the application was perfected. That zone encompassed plaintiff's land as well as 778 other acres along the township's northern perimeter.

Section 16-9 of the ordinance listed the purpose of the EP-250 agricultural-residential environmental protection district as follows:

> This zone includes areas of significant environmental constraints, as identified on the Environmental Constraints Map contained in the adopted Master Plan of Warren Township dated January 22, 1990. Development standards encouraged clustered single-family dwellings. Areas of accessible, and contiguous buildable uplands which are greater than 20 acres are considered appropriate for uses other than strictly large lot single-family residential or clustered single-family dwellings. Conditional uses consist of nursing homes, retirement facilities, private membership, non-profit and recreation facilities.

Section 16-9 increased the minimum lot size from the one-and-one-half acres allowed under the previous ordinance to a minimum lot size of six acres. Under the new ordinance plaintiff could develop no more than four lots on its land, rendering the project economically unfeasible in plaintiff's view. This action ensued.

The trial court held that the EP-250 zone was facially valid. The court determined that the minimum lot size was justified due to subsurface rock formations that would require one to 3.95 acres to provide for adequate individual septic systems because of the high water-table concerns. The court deferred to the Township's judgment that additional regulation was needed in view of the combination of environmental factors including flood plain, steep slopes, seasonable high water, and wetlands present throughout the EP-250 zone. It reasoned that the multiplicity of those factors supported enactment of the EP-250 zone. Indeed, plaintiff does not contest the validity of the zoning ordinance in respect of the other 778 acres that constitute the tract carved out by the Township along its northern border.

On the other hand, the court noted that there was evidence to support the view that the ordinance was arbitrary and capricious as applied to plaintiff's property. Nonetheless, the court concluded that that issue was better left to the Board of Adjustment for consideration in a variance application and determined not to reach the as-applied issue until after plaintiff made such an application.

On appeal, the Appellate Division affirmed the facial validity of the ordinance but remanded the matter to the trial court with the direction to consider the constitutionality of the ordinance as applied to plaintiff's property, and whether application of the ordinance constituted an uncompensated taking of plaintiff's property.

On remand, the trial court held that the EP-250 zoning was arbitrary as applied to plaintiff's property because the environmental concerns generating the creation of the EP-250 zone factually were inapplicable to plaintiff's property. The court had intimated as much in its first decision but expanded on its reasons for now holding that the ordinance was arbitrary, capricious, and unreasonable as applied. The trial court also held that a taking of plaintiff's property had occurred because the ordinance did not substantially advance a legitimate state interest.

On appeal for the second time, in an unpublished opinion the Appellate Division reversed the takings ruling of the trial court. The court concluded that the restrictions on plaintiff's land did not result in a taking of private property although the profit plaintiff could earn from development of the land had been reduced by operation of the revised zoning ordinance. The court determined that as long as a feasible use remains, no taking had occurred. Concerning the as-applied challenge, the Appellate Division concluded that inclusion of plaintiff's property in the EP-250 zone was consistent with the Township's overall concern for open

space and preservation of farmland as generally expressed in amendments to its Master Plan. Plaintiff's action was dismissed in its entirety.

II.

Municipalities possess broad police power to zone for the public good insofar as the Legislature delegates that authority. Riggs v. Township of Long Beach, 109 N.J. 601, 610 (1988). A strictly circumscribed judicial role in reviewing zoning regulations effectuates that broad zoning power. Harvard Enters., Inc. v. Bd. of Adjustment, 56 N.J. 362, 368 (1970); see also Pascack Ass'n v. Mayor of Washington, 74 N.J. 470, 481 (1977) (referring to "sound and long established principles concerning judicial respect for local policy decisions in the zoning field"); Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 343 (1973) (stating that function of court is not "to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently"); Kozesnik v. Township of Montgomery, 24 N.J. 154, 167 (1957) (stating that judiciary should not exercise zoning power "indirectly by measuring the policy determination by a judge's private view"). Although a strong presumption of validity insulates a zoning ordinance from challenge, a plaintiff overcomes that presumption through an affirmative showing that the ordinance "in whole or in application to any particular property" is "clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute." Bow & Arrow Manor, Inc., supra, 63 N.J. at 343; accord Riggs, supra, 109 N.J. at 610-11; Ziinsky v. Zoning Bd. of Adjustment, 105 N.J. 363, 368 (1987); Harvard Enters., Inc., supra, 56 N.J. at 368; Gruber v. Mayor & Township Comm., 39 N.J. 1, 12 (1962); Zampieri v. Township of River Vale, 29 N.J. 599, 605-06 (1959); Cobble Close Farm v. Bd. of Adjustment, 10 N.J. 442, 451 (1952).

In evaluating whether a zoning ordinance is arbitrary, capricious, or unreasonable, a court's role is not to pass on the wisdom of the ordinance; that is exclusively a legislative function. Home Builders League of S. Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 137 (1979); Ward v. Township of Montgomery, 28 N.J. 529, 539 (1959). Rather, a court engages in a review of the relationship between the means and ends of the ordinance. Taxpayers Ass'n of Weymouth Township, Inc. v. Weymouth Township, 80 N.J. 6, 21 (1976); Roselle v. Wright, 21 N.J. 400, 410 (1956); Schmidt v. Bd. of Adjustment, 9 N.J. 405, 416 (1952). In the context of a zoning challenge,

> the means selected must have real and substantial relation to the object sought to be attained, and the regulation or proscription must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated.

[Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 251 (1971).]

Put another way, the fundamental question in all zoning cases "is whether the requirements of the ordinance are reasonable under the circumstances." Vickers v. Township Comm., 37 N.J. 232, 245 (1962), appeal dismissed and cert. denied, 371 U.S. 233, 83 S. Ct. 326, 9 L. Ed. 2d 495 (1963), modified on other grounds by S. Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 276-77 (1983); see also Berger v. State, 71 N.J. 206, 223-24 (1976) (stating that zoning regulation "must be reasonably designed to resolve the problem without imposing unnecessary and excessive restrictions on the use of private property"); Katobimar Realty Co. v. Webster, 20 N.J. 114, 123 (1955) ("Excesses in the realization of the statutory considerations are inadmissible.");

Yanow v. Seven Oaks Park, Inc., 11 N.J. 341, 360 (1953) (noting that "it is settled that the burden is upon the one who attacks the particular ordinance in question to show clearly that it is unreasonable").

III.

Plaintiff concedes, as it must, that defendant pursued legitimate goals in zoning to preserve the environment, open space, and agriculture. Although the legitimacy of those purposes is beyond question, a landowner may challenge the application of an otherwise valid ordinance to a specific tract of property. Odabash v. Mayor of Dumont, 65 N.J. 115, 123 (1974); AMG Assocs. v. Township of Springfield, 65 N.J. 101, 104 (1974). In this appeal, the critical determination to be made is whether application of defendant's EP-250 zoning regulation to plaintiff's property rationally advances those purposes. "[A]n ordinance that may operate reasonably in some circumstances and unreasonably in others is not void in toto, but is enforceable except where in the particular circumstances its operation would be unreasonable and oppressive." Harvard Enters., Inc., supra, 56 N.J. at 368.

Our review of the record reveals ample support for the trial court's conclusion that application of the zoning ordinance to plaintiff's property was arbitrary, capricious, and unreasonable. The trial court was intimately familiar with all aspects of this litigation, pretrying the case in October 1994, and trying the case in August 1995, and again on remand from the Appellate Division in November 1997. Through years of managing this litigation, including evaluating evidence and hearing witnesses, the trial court developed a "feel" for the case that ought not be lightly disturbed. Township of West Windsor v. Nierenberg, 150 N.J. 111, 132-33 (1997); Caldwell v. Haynes, 136 N.J. 422, 432 (1994). In response to plaintiff's contention that the zoning ordinance was arbitrary and capricious as applied to its property, the trial court relied on

substantial evidence in the record to support its conclusion that "few of the environmental concerns which justified the passage of the ordinance apply to this apparently unique piece of property." The trial court fully explained that conclusion:

> [T]here are aspects of hardship which result from the inclusion of Pheasant Bridge's property in the EP-250 zone. Both Warren's planner and Pheasant Bridge's testified that Pheasant Bridge's property, and in fact all property in the EP-250 district, was devoid of any steep slopes. It was also unclear that the property was located in any flood hazard area. The only environmental constraint to which the property in question was subject, was the high water table which could complicate construction and make a septic system not feasible, but it was undisputed that a building could be safely constructed on the site and sewer access would alleviate any septic system concerns. In fact, it seemed clear that Pheasant Bridge's property had unique access to the sanitary sewer's system, circumstances which could resolve any concerns about all environmental issues.
>
> [Emphasis added.]

When the case returned on remand, the trial court did not deviate from its original belief that the environmental concerns that justified passage of the EP-250 zone did not pertain to plaintiff's property:

> In the original decision in this matter, the Court noted that the environmental concerns which, in part, justified the passage of the ordinance did not apply to the property of

> Pheasant Bridge. The presence of wetlands was among the reasons for the passage of the offending ordinance, yet they are already heavily regulated and the field has been pre-empted by the State. Flood plains are regulated by both Warren and the State of New Jersey. The existing regulations appear completely adequate and the need for or even the advantage of, a six acre minimum lot size, was never clearly articulated. Warren also alleged that the presence of a high water table was a supporting factor as well, but the effect of that condition is lessened substantially by this property's access to sanitary sewers. While there are other concerns from a high water table, such as wet basements, those problems are readily avoided. Warren's concerns over properties with steep slopes has no application to the property since it contains no steep slopes. The purposes of Ordinance 92-24 advanced by Warren are therefore not served by the application of the ordinance to the property of Pheasant Bridge.

The trial court, therefore, made detailed findings based on substantial, credible evidence concerning the nature and extent of environmental constraints affecting plaintiff's property. The limited scope of appellate review requires deference to the trial court's findings when supported by adequate, substantial, and credible evidence. Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988); Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974).

That adequate, substantial, and credible evidence supported the trial court's findings in this matter was confirmed by the Appellate Division. Although it reversed the

trial court's judgment, the Appellate Division did not disturb the determination that plaintiff's property was not subject to the specific environmental constraints affecting the rest of the EP-250 zone. Nevertheless, the Appellate Division sustained the ordinance's application to plaintiff's property primarily on the basis that it perceived the ordinance as including among its intentions, besides environmental protection, the preservation of farmland because farmland is one of the listed uses of the EP-250 zone

From its base of factual findings, the trial court concluded that the zoning ordinance was arbitrary and capricious as applied to plaintiff's property. Although a trial court's legal interpretations are not entitled to special deference, Manalapan Realty, L.P. v. Township Comm., 140 N.J. 366, 378 (1995), we agree with the trial court's legal conclusion in this matter. The dearth of environmental limitations on plaintiff's property leads us to conclude, as did the trial court, that the ordinance is arbitrary, capricious, and unreasonable as applied to plaintiff. We rely on enduring principles governing municipal exercise of the zoning power in reaching that conclusion. As this Court stated in Home Builders, supra, 81 N.J. at 138, "[t]he purposes sought to be accomplished [by a zoning ordinance] must justify the restrictions placed on the use of one's land[,]" and "[t]he means used to attain the ends must be reasonably related to those ends." Those well-established criteria are not met here because defendant's zoning ordinance fails to accomplish its purposes when applied to plaintiff's property. The means-ends relationship is illusory. Plaintiff convincingly points to the lot immediately south and contiguous to its property as having essentially identical physical characteristics, yet that contiguous property is zoned to allow development at the one-and-one-half acre density that previously applied to plaintiff's property. The Township offers no justification for distinguishing between the two parcels. Indeed, at argument

before this Court, the Township took the position that it encouraged plaintiff to apply for a variance. We find no justification for requiring plaintiff to seek variance relief. In Riggs v. Township of Long Beach, supra, 109 N.J. at 617, this Court upheld the trial court's conclusion that the zoning ordinance at issue was invalid as arbitrary and unreasonable, and that after years of litigation, "[t]he time ha[d] come to bring [the] matter to a close." Ibid. Accordingly, the case was remanded to the Law Division for entry of an order declaring the challenged ordinance invalid and for regulation of the plaintiff's property under the prior zoning ordinance to permit subdivision of the property in line with its requirements. Ibid. Here, plaintiff has met its burden by affirmatively demonstrating that the means chosen do not bear any "real and substantial" relationship to the ostensible purposes of the zoning provision. It is time to bring this litigation to an end also.

Finally, we note for completeness that the Appellate Division was persuaded, in part, by the Township's argument that the EP-250 zone's purpose also was to preserve farmland and open space consistent with the Township's Master Plan. The trial court disposed of that explanation as follows:

> There is no dispute about the purpose of the EP-250 zone. In fact, the designation EP stands for 'Environmental Protection'. The Master Plan described the purpose: 'It is meant to guarantee the protection of environmentally sensitive features which are predominant in the area, to insure the continuation of this area as open space and recreation, promote agricultural retention where appropriate, and maintain the predominantly rural character.' In the original decision in this matter, the Court noted that the environmental concerns which, in part,

justified the passage of the ordinance did not apply to the property of Pheasant Bridge. . . .

The only purposes for establishing the EP-250 zone which have application to the property of Pheasant Bridge are the goals of 'continuation of this area as open space and recreation . . . and maintain the rural character.' The presence of those references in the Master Plan has not been the subject of argument in this matter. Such language suggests the goal of the ordinance is maintenance of the status quo. Since the property is now vacant, one apparent goal of the EP-250 requirements was the maintenance of the property in its vacant state. . . . [But] authority is generally seen as lacking for the establishment of lot sizes which are not supported by the requirement necessary to accommodate septic and water systems.

Warren has submitted additional arguments which are founded on recent amendments to the Master Plan. For example, Warren has recently added the argument that the offending provisions of Ordinance 93-24 are justified by a desire to preserve farm land and six acres is the appropriate size under the Farmland Assessment Act. On its face that argument seems contrived because of its late arrival and its omission from the very substantial Master Plan adopted by the Planning Board. Furthermore, the soils map for the EP-250 zone shows the soil is ill suited for farming. Since it was not advanced at trial nor mentioned at the time the ordinance was enacted, it will not be further considered.

[Citations omitted.]

We agree with the trial court's assessment that those later arguments advanced by the Township do not overcome the arbitrariness of applying the EP-250 zone requirements to plaintiff's property that was known to be different from the rest of the property in the zone. The parcel had been prepared for development with sewer capacity, was in the process of securing its approvals, and was virtually indistinguishable from the contiguous lot to its immediate south that had been allowed to remain at the one-and-one-half acre limit on subdivision size for residential development. We accept the trial court's findings and conclusions. "Arbitrary or unreasonable zoning ordinances cannot stand." Home Builders, supra, 81 N.J. at 137-38. The zoning ordinance is invalid as applied to plaintiff's property.

IV.

Having successfully challenged the municipal zoning ordinance as applied to its property, plaintiff contends that it is entitled to a financial remedy for the temporary taking of its property caused by operation of the invalidated zoning ordinance. Plaintiff acknowledges that regulatory delay, absent extraordinary circumstances, does not constitute a temporary taking, but nonetheless argues that it is entitled to damages as a remedy for the temporary taking during the period between the adoption and the as-applied invalidation of the EP-250 zone. We disagree. A per se compensable taking does not occur as a result of the temporary application of a zoning ordinance that is ultimately declared invalid in a judicial challenge to the municipal zoning authority.

We note at the outset the coextensive protections afforded under article I, paragraph 20 of the New Jersey Constitution and the Fifth and Fourteenth Amendments of the United States Constitution against the government's taking of property without just compensation. Littman v. Gimello, 115

N.J. 154, 161, cert. denied, 493 U.S. 934, 110 S. Ct. 324, 107 L. Ed. 2d 314 (1989). The United States Supreme Court has made clear that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 314, 107 S. Ct. 2378, 2385, 96 L. Ed. 2d 250, 263 (1987) (discussing need for monetary remedy for "temporary" taking in context of zoning ordinance that denied plaintiff all beneficial use of its property). The Takings Clause "is designed not to limit the governmental interference with property rights per-se but rather to secure compensation in the event of otherwise proper interference amounting to a taking." Id. at 315, 107 S. Ct. at 2385, 96 L. Ed. 2d at 264 (emphasis omitted).[1]

Because we have determined that defendant's zoning ordinance is invalid as applied to plaintiff's property, we are

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[1] In Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998), a majority of the Court reaffirmed those principles. Id. at 545, 118 S. Ct. at 2157, 141 L. Ed. 2d at 484-85 (Kennedy, J., concurring in judgment and dissenting in part); Id. at 554, 118 S. Ct. at 2161, 141 L. Ed. 2d at 490 (Breyer, J., dissenting) (joined by Justices Stevens, Souter, and Ginsburg). In a separate opinion, Justice Kennedy explained that the Takings Clause "has not been understood to be a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." Id. at 545, 118 S. Ct. at 2157, 141 L. Ed. 2d at 484 (Kennedy, J., concurring in judgment and dissenting in part). Similarly, Justice Breyer stated that the language of the Taking Clause suggests that "at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public' good." Id. at 554, 118 S. Ct. at 2161, 141 L. Ed. 2d at 490 (Breyer, J., dissenting) (emphasis omitted). The Taking Clause "presupposes" that the government interference with property is otherwise valid. Id. at 545, 118 S. Ct. at 2157, 141 L. Ed. 2d at 484 (Kennedy, J., concurring in judgment and dissenting in part).

not faced with an "otherwise proper [governmental] interference" that the Takings Clause presupposes. Id. at 314-15, 107 S. Ct. at 2385-86, 96 L. Ed. 2d at 263-64. Instead, we are confronted with plaintiff's assertion that it experienced a temporary taking merely by having been subjected to an invalid ordinance during the time it took to challenge successfully the ordinance's application. Case law, including the decision in First English, does not support that conclusion.

The significance of First English relates only to the remedy available once a taking is established, as the Court assumed for purposes of its decision that the regulation at issue deprived the landowner of all beneficial use of his property and thus constituted a taking. First English, supra, 482 U.S. at 322, 107 S. Ct. at 2389, 96 L. Ed. 2d at 268 (stating assumption that ordinance "has denied appellant all use of its property for a considerable period of years"). Moreover, the Court in First English specifically limited its holding to the facts presented, explaining that it did "not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and like which are not before us." Id. at 321, 107 S. Ct. at 2389, 96 L. Ed. 2d at 268.

The takings issue in this appeal is quite different. Here, we are concerned with an invalid ordinance in which government went beyond the scope of its zoning power, rather than a valid ordinance that effected a taking. Unlike First English, this appeal implicates a challenge to the zoning ordinance itself, a question not before the Court in First English. Moreover, we see no distinction justifying the need to provide for interim monetary damages between regulatory delay in securing a change in, or variance from, a zoning ordinance and delay occasioned by resort to judicial processes to challenge application of a zoning ordinance to one's property. Cf. MacDonald, Sommer & Frates v. County of

Yolo, 477 U.S. 340, 351, 106 S. Ct. 2561, 2567, 91 L. Ed. 2d 285, 296 (1986) (holding taking claim not reviewable so long as property owner had opportunity to pursue variance or other form of relief that would permit development to proceed); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 190-91, 105 S. Ct. 3108, 3118-19, 87 L. Ed. 2d 126, 141 (1985) (declining to consider taking claim when long-term economic effects uncertain due to questions concerning whether restriction would be permanent). If such a distinction were accepted, it could have a chilling effect on land-use planning, for the adoption of an invalid ordinance could prove financially devastating to a municipality that was unsuccessful in its defense to a drawn-out constitutional challenge.

Moreover, we note the Appellate Division's critical observation that "plaintiff does not claim all beneficial use of its property was removed; it simply claims it could have made a more profitable use of its property." This Court has determined that neither diminution of land value itself nor impairment of the marketability of land alone constitutes a taking. Gardner v. N.J. Pinelands Comm'n, 125 N.J. 193, 259 (1991). And First English itself "merely h[e]ld that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321, 107 S. Ct. at 2389, 96 L. Ed. 2d. at 268 (emphasis added); see also Palazzolo v. R.I., 69 U.S.L.W. 4605, 4612 (U.S. June 28, 2001) (holding that State Supreme Court did not err in rejecting regulatory takings claim where plaintiff not deprived of all economically beneficial use of parcel); Littman, supra, 115 N.J. at 164 (restating that inverse condemnation requires total or substantial destruction of beneficial use of property); Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Comm'n, 98 N.J. 258, 263 (1985) (determining in context of

review of moratorium on all real estate development for period of nineteen months "that a compensable taking can occur when governmental action substantially destroys the beneficial use of private property"). Similarly, in evaluating a temporary taking claim, the Appellate Division in Grand Land Co. v. Township of Bethlehem, 196 N.J. Super. 547 (App. Div. 1984), certif. denied, 101 N.J. 253 (1985), affirmed the invalidation of a zoning ordinance and agreed with the trial court that the plaintiff was

> not entitled to damages for an unlawful taking of its property. At the most that claim would be limited to interim damages between the adoption of the zoning ordinance amendment and its invalidation. During that period the property continued in agricultural use, clearly a reasonable use to which it was adapted and which was not economically unfeasible.
>
> [Id. at 552.]

The Appellate Division thus concluded that no temporary taking had occurred because the plaintiff had retained some economically beneficial use of its property.

The highest courts of other states have reached the same conclusion that a temporary taking requires a showing that a landowner was deprived of all economically beneficial use of property. Miller & Son Paving, Inc. v. Plumstead Township, 717 A.2d 483, 486 (Pa. 1998) (determining that delays attributable to legal challenges to zoning provisions do not automatically constitute temporary taking because economically beneficial uses remained unaffected by invalid provision), cert. denied, 525 U.S. 1121, 119 S. Ct. 903, 142 L. Ed. 2d 902 (1999); Cornish Town v. Koller, 817 P.2d 305, 308 (Utah 1991) (finding no temporary taking where zoning permitted continued farming practices and thus did not deprive plaintiff of all uses of property); Chioffi v. City of

Winooski, 676 A.2d 786, 790 (Vt. 1996) (concluding, in rejecting claim, that temporary taking requires showing of total denial of all economically beneficial use; regulatory delay resulting from zoning board denial of variance, granted ultimately through judicial intervention, did not constitute taking); City of Va. Beach v. Va. Land Inv. Ass'n, 389 S.E.2d 312, 316 (Va. 1990) (determining First English inapposite and finding no temporary taking because plaintiff not deprived of all use of land); cf. Smith v. Town of Wolfeboro, 615 A.2d 1252, 1258 (N.H. 1992) (noting that inherent delay in "process of obtaining subdivision approval, including appeals to the superior court and to this court, is one of the incidents of ownership. Any decrease in value of the subject property that occurs during the pendency of governmental decision making must be borne by the property owner" and is not taking); Sea Cabins on the Ocean IV Homeowners Ass'n v. City of North Myrtle Beach, No. 25307, 2001 WL 639180, at *7 (S.C. June 11, 2001) ("[A]lthough a property owner who successfully challenges the applicability of a governmental regulation is likely to have suffered some temporary harm during the process, the harm does not give rise to a constitutional taking.").

Also instructive is a federal decision concerning a New Jersey zoning dispute, John E. Long, Inc. v. Borough of Ringwood, 61 F. Supp. 2d 273, 276 (D.N.J. 1998), aff'd, 213 F.3d 628 (3d Cir. 2000), that considered whether denial of a landowner's re-zoning application constituted a temporary taking. Dismissing the plaintiffs' temporary takings claim, the court reasoned:

> The denial of Plaintiffs' application did deprive them of the best and most profitable use of their land. . . . The Borough's denial of the application did not, however, deprive Plaintiffs of all economically viable uses of the Property. Plaintiffs were still entitled to go ahead with

> the subdivision of the land and the building of homes on lots of three acres or more. What they could not do was subdivide the Property and build houses on lots of less than three acres. Therefore, Plaintiffs were certainly left with an economically viable use of their Property.
>
> [Id. at 288.]

That view is consistent with decisions of the Third Circuit Court of Appeals on the takings inquiry. Bello v. Walker, 840 F.2d 1124, 1131 (3d Cir.) (finding no taking where plaintiffs denied building permit but retained right to dedicate property to variety of other uses); Pace Res., Inc. v. Shrewsbury Township, 808 F.2d 1023, 1031 (3d Cir.) (finding no taking where plaintiff not stripped of all economically viable uses of property, although denied best use or uses of property), cert. denied, 482 U.S. 906, 107 S. Ct. 2482, 96 L. Ed. 2d 375 (1987).

The overwhelming weight of authority from the federal courts and other state courts, and of prior holdings of this Court, therefore, requires that a plaintiff demonstrate deprivation of all or substantially all economically beneficial uses of property to sustain a claim for a temporary taking. Here, the record indicates that plaintiff has not — and could not — make such a demonstration. That farming continued on the parcel during this litigation and that plaintiff retained the right to develop a conforming use of the property under the new ordinance are undisputed. Therefore, we conclude that the Appellate Division's dismissal of plaintiff's takings claim was appropriate.

V.

Accordingly, we reverse that portion of the judgment of the Appellate Division that concerned plaintiff's as-applied challenge and remand the matter to the Law Division for

restoration of the zoning that pertained to plaintiff's property prior to its inclusion in the EP-250 zone. We affirm that portion of the Appellate Division judgment dismissing plaintiff's takings claim.

CHIEF JUSTICE PORITZ and JUSTICES STEIN, COLEMAN, LONG, VERNIERO, and ZAZZALI join in JUSTICE LaVECCHIA's opinion.

[APPENDIX B. INITIAL OPINION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, SOMERSET COUNTY, DISMISSING PETITIONER'S COMPLAINT]

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY

CIVIL ACTION

DOCKET NO. SOM-L-127-94 PW

PHEASANT BRIDGE CORPORATION, a corporation of the State of New Jersey

Plaintiff

vs.

TOWNSHIP OF WARREN, in Somerset County, a municipal corporation of the State of New Jersey

Defendant

OPINION
(Filed October 17, 1995)

This matter is an action in lieu of prerogative writ and comes before the court as a result of the decision of the Township of Warren, hereinafter "Warren," to increase by ordinance the minimum lot size in a particular section of the Township.

On December 28, 1986, Plaintiff Pheasant Bridge Corporation,

hereinafter "Pheasant Bridge," purchased 28.98 acres of township land (designated as lot 9.01 in block 198 on the tax map) abutting the Passaic River. At the time of the purchase, the land was zoned to require a minimum lot size of 1.5 acres. However, Pheasant Bridge was unable to build on its land at the time, for there was no capacity in the sewerage system to accommodate Pheasant Bridge and it seemed clear that the high water table on the property would have made construction of adequate septic systems on one and one half acre lots difficult, if not impossible. During the approximately seven years that followed, Pheasant Bridge successfully attempted to resolve the sewerage capacity issue that delayed construction. Part of this exercise was the paying of $42,000 to the Warren Township Sewerage Authority to participate in the Warren reserve sewerage capacity program. The subject property therefore now has sewer access while it is apparently not otherwise available throughout the EP-250 zone.

On December 2, 1993, allegedly in response to a variety of environmental conditions that affected lands in the Township, Warren adopted Ordinance 93-24, which created the EP-250 zone. Among those described conditions which allegedly justified Ordinance 93-24 are open water, 0-1 foot depth seasonal high water tables, wetlands and wetlands buffers, steep slopes exceeding 19 percent grades, and 100 and 500 year floodplain. The zone includes Pheasant Bridge's property together with an additional 778 acres of land along the northerly line of Warren. The new zone included a minimum lot size of six acres for a structure in the zone. Given the new acreage requirement, Pheasant Bridge may develop no more than four lots. Under the former zoning scheme, Pheasant Bridge could enjoy a yield of 8 to 15 lots on its property.

Prior to these 1993 zoning changes, in 1989 the Warren Planning Board had adopted a Master Plan which was

influenced by a survey of Warren residents and which encouraged strongly and repeatedly the preservation of the remaining undeveloped lands in the Township. The lot size changes in the EP-250 district are said to be justified in the Master Plan by virtue of the presence of subsurface rock formations which would require 1 to 3.95 acres to provide for an individual septic system. The plaintiff contends, in response that while a high water table is said to characterize the EP-250 district, it does not preclude construction of a home where sanitary sewers are available. Wetlands are said to be a further reason for constraint on development of lands in the EP-250 district, but the relationship is not explained in the Master Plan or the Zoning Ordinance. The parties agree that the amount of wetlands on the subject property is still unknown, although generally believed to be more than 15%. While steep slopes are another mentioned constraint on development in the district, the witnesses agreed that the Pheasant Bridge's property has no steep slopes and there are few throughout the EP-250 zone. Finally the presence of flood plains in the district is described as an added reason for constraint on development.

Pheasant Bridge argues that the adoption of Ordinance 93-24 was an arbitrary, capricious, and unreasonable exercise of municipal zoning authority, which constitutes a taking of property for which compensation must be paid. Pheasant Bridge makes two separable arguments, i.e., the ordinance is invalid as arbitrary and, secondly, the ordinance constitutes a "taking." Pheasant Bridge concedes that a municipality may take environmental concerns into account when crafting a zoning ordinance. N.J.S.A. 40:55D-2(e). However, Pheasant Bridge objects to this ordinance because none of the environmental concerns the Warren considered in constructing the zone support the adoption of a six acre lot requirement, especially when it is applied to Pheasant Bridge's property. For example, the open water and steep

slope conditions do not exist on Pheasant Bridge's property. Pheasant Bridge does indeed make a strong case with respect to its own property, but the arguments with respect to all properties in the zone are less convincing.

Pheasant Bridge also objects to claims that the 0-1 foot depth seasonal high water tables could cause flooding, septic systems to pollute groundwater, and damage to roads and parking lots due to the freezing and thawing of water near the ground surface. In response to these anticipated problems, Pheasant Bridge contends that flooding can be prevented by building structures without basements. Also, road damage is unrelated to the size of lots because higher densities allow for the construction of fewer structures. Therefore, the fewer the number of buildings, the less likely an abutting road will be maintained. Ultimately, roads may fall into disrepair due to the lack of care. Moreover, sewer systems can be used in place of septic systems, thereby reducing the potential for groundwater pollution. Such pollution can also be reduced by altering the size of a septic tank, a measure which does not require adoption of six acre lot densities.

Additionally, Pheasant Bridge believes that the ordinance is arbitrary because municipalities are precluded by federal and state law from regulating wetlands. N.J.S.A. 13:9B-30. Lastly, Pheasant Bridge contends Warren already regulates floodplain under other township codes and does not further protect the floodplain by instituting a 6 acre minimum. But Warren contends in response that there is no conflict because there is no direct regulation of wetlands, but rather the fact of their existence is simply taken into account. Warren also contends the ordinance does not constitute a taking but rather is justified by the purpose of zoning under New Jersey law.

It is clearly the law of this state that municipal zoning regulations are presumed valid. This does not mean,

however, that zoning laws are shielded from review. Rather, according to the Supreme Court's decision in Riggs v. Long Beach Township, 109 N.J. 601, 610-11 (1988):

> Municipalities do not possess the inherent power to zone, and they possess that power, which is an exercise of the police power, only insofar as it is delegated to them by the Legislature. Taxpayers Assn. of Weymouth Township v. Weymouth Township, 80 N.J. 6, 20 (1976). A zoning ordinance is insulated from attack by a presumption of validity, which may be overcome by a showing that the ordinance is "clearly arbitrary, capricious, or unreasonable, or plainly contrary to fundamental principles of zoning or the (zoning) statute. Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335, 343 (1973); accord Zilinsky v. Zoning Board of Adjustment of Verona, 105 N.J. 363, 368 (1987); Weymouth Township, supra, 80 N.J. at 20. The party attacking the ordinance bears the burden of overcoming the presumption, Ward v. Montgomery Township, 28 N.J. 529, 539 (1959); LaRue v. East Brunswick, 68 N.J. Super. 435, 454 (App.Div. 1961); and, in meeting the burden, that party may rely on extrinsic evidence, Bellington v. Township of East Windsor, 32 N.J. Super. 243, 248 (App.Div. 1954), aff'd 17 N.J. 558 (1955). Courts should not question the wisdom of an ordinance, and if the ordinance is debatable, it should be upheld. Bow & Arrow Manor, supra, 63 N.J. at 343; see also Zilinsky, supra, 105 N.J. at 368-369 ("a mere difference of opinion as to how an ordinance will work will not lead to a

> conclusion of invalidity; 'no discernible reason' is the requisite standard'').

The initial question that this case presents, therefore, is whether Warren's decision to adopt a six acre lot minimum for development in the EP-250 Zone is arbitrary, capricious, or unreasonable. "The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon." N.J.S.A. 40:55D-62. In adopting Ordinance 93-24, Warren promoted a legitimate interest that serves the community as well as a goal of the Municipal Land Use Law. Clearly, an ordinance which aims to preserve and protect the environment is in the best interests of a community's citizens. "Land use regulations should take into account ecological and environmental concerns." In order to be valid, however, a zoning law must advance the public health, safety, morals or general welfare of the community. Southern Burlington County N.A.A.C.P. v. Mount Laurel Township, 67 N.J. 151, 175 (1975) (Mount Laurel I). The change in zoning which is challenged here is defended in part because the requirement is described as grounded in protection of the general welfare. There is precedent for the perception that the general welfare is served by preservation of the environment. This conclusion is supported by several decisions. In Albano v. Mayor & Township Committee of Township of Washington, 194 N.J. Super. 265, the Township of Washington had enacted an ordinance which had increased the minimum lot size on the plaintiff's property from one to three acres. The purpose of the change was to prevent further pollution of a water source resulting from construction. Streams that rested on the plaintiff's property emptied into the polluted water source. The ordinance there was held to be valid as "necessary for public protection of a vital interest." Albano, supra, at 275. Thus, the question in Pheasant Bridge is whether an increase from 1.5 to 6 acres will provide protection of a vital interest.

Zoning is done on a district by district basis. Although Pheasant Bridge might not be affected by the constraints of Ordinance 93-24, the town's duty to create zones with the particular characteristics of the entire zone, not individual tracts, is paramount. The extent of the change in the acreage requirement for the EP-250 zone is not as important as whether the change in the zoning ordinance properly addresses the concerns for which the change was made. **The record in the present case does not support a finding that the regulations contained in Ordinance 93-24 are unnecessary to protect the environment.**

A second decision that supports environmental actions based upon concern for the general welfare is Sporkin v. Stafford Township, 227 N.J. Super. 569. Sporkin deals with wetlands. Stafford Township in that case did not directly regulate wetlands. However, the regulations that were imposed were designed to regulate construction in an area that abutted environmentally sensitive wetlands and were based in part on that fact. In that case the court apparently relied upon legislative findings in the Coastal Area Review Act, N.J.S.A. 13:19-2 (Sporkin, supra at 572). In the present case a variety of environmental conditions exist which collectively are asserted as supporting the change in minimum acreage.

In Pheasant Bridge, one issue is whether Warren Township was precluded from regulating wetlands. There is strong support for an affirmative answer to that question. N.J.S.A. 13:9B-6 and N.J. Chapter of NAIOP v. Dept., 241 N.J. Super. 145, 153. But the question need not be resolved here for Sporkin suggests that a township may take wetlands into account in creating ordinances. In the present case there was no direct regulation of wetlands, although they were taken into account.

Warren found that the area inside the EP-250 Zone is subject to severe environmental constraints that justify the crafting of

the zone. Specifically, Warren is concerned about wetlands, floodplain, seasonal high water tables, open water, and steep slopes. Consequently, Warren restricted land use to various conditional uses including the six acre lot single family dwelling requirement about which Pheasant Bridge complains. The six acre lot size was determined, according to testimony from the Township Planner, so that the individual lots would qualify for farmland assessment. There is precedent for Warren's position that the lot size of six acres is also properly supported by the desire to encourage the continued agricultural use of the lands within the EP-250 zone. Grand Land Co. v. Township of Bethlehem, 196 N.J. Super. 547 (App. Div. 1984) cert. denied 101 N.J. 253 (1985). **Given the findings that Warren made, it acted properly when it established the EP-250 Zone.**

Pheasant Bridge contends that even if the ordinance is not arbitrary and capricious, it fails the "rational basis test" in that the ordinance lacks a rational connection to the stated objective of preserving the environment. U.S.A. Chamber of Commerce v. State, 89 N.J. 131 (1982). Pheasant Bridge contends that this ordinance does not protect the environmentally sensitive areas. In fact all of Pheasant Bridge's arguments could be summarized by the statement that the pre-existing regulations did an adequate job of affording such protection and the addition of the six acre minimum lot size was an unnecessary and improper step with no "rational basis" for the stated objective.

After careful examination, that argument is not convincing. Here Warren concluded some additional regulation was needed in view of the combination of environmental factors that were present. Floodplain, steep slopes, seasonal high water and wetlands are present throughout the EP-250 zone. While steep slopes are admittedly not a significant factor, the other factors are all present to a large degree. **It is the multiplicity of factors that justified the passage of the EP-**

250. There was no dispute about the fact that the property abutted the Passaic River, was subject to potential flooding, had a high water table and a substantial amount of wetlands. It was also uncontested that the Pheasant Bridge property had only been used as farmland and in fact was still being used for the harvest of hay. Most of Pheasant Bridge's evidence properly dealt with the application of the new zoning requirements to its own property. While there was no evidence of any steep slopes in the entire EP-250 district, there was no substantial dispute about the general applicability of Warren's concerns through the balance of the district. **The evidence therefore did establish a sufficient rational nexus to the provisions of the EP-250 zone.**

To be sure, there are aspects of hardship which result from the inclusion of Pheasant Bridge's property in the EP-250 zone. Both Warren's planner and Pheasant Bridge's testified that Pheasant Bridge's property, and in fact all property in the EP-250 district, was devoid of any steep slopes. It was also unclear that the property was located in any flood hazard area. The only environmental constraint to which the property in question was subject, was the high water table which could complicate construction and make a septic system not feasible, but it was undisputed that a building could be safely constructed on the site and sewer access would alleviate any septic system concerns. In fact, it seemed clear that Pheasant Bridge's property had unique access to the sanitary sewers system, a circumstance which could resolve any concerns about all environmental issues. But it is not enough that Pheasant Bridge's property could, perhaps, be developed at a higher density without environmental detriment, Sporkin, supra, at 571. Pheasant Bridge has not overcome the presumption of validity in this regard and the defendant is therefore entitled to a dismissal.

While the plaintiff has contended that the ordinance which enacted the EP-250 zone was invalid, it has also argued that

it was arbitrary and capricious as applied to its own property. **There is some evidence to support that view, given the fact that few of the environmental concerns which justified the passage of the ordinance apply to this apparently unique piece of property. That issue is better left to the Board of Adjustment for consideration in a variance application.** This court should not ordinarily decide on the validity of an ordinance until Pheasant Bridge has sought a use variance. Deal Gardens, Inc. v. Board of Trustees of Loch Arbour, 48 N.J. 492.

Although the plaintiff briefed the issue of whether the ordinance challenged here deprived the plaintiff of economically viable use of its land, that issue was not prosecuted at trial and therefore was not considered.

[APPENDIX C. LAW DIVISION JUDGMENT DISMISSING PETITIONER'S COMPLAINT]

Our File No.: 89,3479/kc

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Attorney(s) for Defendant, Township of Warren

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY

CIVIL ACTION

DOCKET NO. SOM-L-127-94 PW

PHEASANT BRIDGE CORPORATION, a corporation of the State of New Jersey,

Plaintiff,

vs.

TOWNSHIP OF WARREN, in Somerset County, a municipal corporation of the State of New Jersey,

Defendant.

ORDER FOR JUDGMENT
(Filed November 13, 1995)

THIS MATTER having been presented for trial before the Court without jury on August 7, 8 and 9, 1995 by Joseph Murray, attorney for plaintiff Pheasant Bridge Corporation and by Timothy P. Beck, attorney for defendant, and the Court having heard the testimony of the witnesses presented and reviewed the evidence and briefs submitted, and for good cause shown:

IT IS on this 13th day of Nov., 1995;

ORDERED that judgment be and hereby is entered in favor of defendant Township of Warren dismissing the plaintiff's Complaint for those reasons and based upon that authority cited in the Court's Opinion issued on October 17, 1995, which opinion is made part of this Order for Judgment and incorporated herein by reference;

IT Is FURTHER ORDERED that a copy of the within order shall be served upon all counsel to this action within 5 days of the date hereof.

s/ Robert E. Guterl
ROBERT E. GUTERL, P.J.Cv.

[APPENDIX D. FIRST OPINION AND JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, ON PETITIONER'S APPEAL]

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2269-95T3

PHEASANT BRIDGE CORP., a corporation of the State of New Jersey,

Plaintiff-Appellant,

-v-

TOWNSHIP OF WARREN, a municipal corporation of the State of New Jersey,

Defendant-Respondent.

Argued: March 19, 1997 - Decided: MAR 2 7 1997

(Filed March 27, 1997)

Before Judges Baime, P.G. Levy and Braithwaite.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County.

Joseph E. Murray argued the cause for appellant (Joseph E. Murray & Associates, P.A., attorneys; Mr. Murray, of counsel; Jay B. Bohn, on the brief).

Timothy P. Beck, argued the cause for respondent (Bivona, Cohen, Kunzman, Coley, Yospin, Bernstein & DiFrancesco, attorneys; Mr. Beck, on the brief).

PER CURIAM

Warren Township rezoned more than 800 acres into

an EP-250 zone in 1993. Plaintiff had purchased twenty-nine acres in 1986 when its tract was zoned for one and one-half acre residential lots. It solved its sewer problem and was granted reserve capacity holder status, but then the municipality changed the zoning. The rezoning reduced the economic development yield from between eight to fifteen lots to only four lots. Plaintiff claims the new ordinance is unconstitutional as applied to its property and is an unconstitutional taking of its land.

Judge Guteri held the ordinance was valid because plaintiff failed to prove it was "clearly arbitrary, capricious, or unreasonable, or plainly contrary to fundamental principles of zoning or the [Municipal Land Use Law]." We agree with that analysis and affirm.

Plaintiff claimed that even if the ordinance was not arbitrary or not unreasonable, the EP-250 zoning regulations failed to substantially advance a legitimate state purpose and thus constituted a taking, without regard to the economic effect of the regulation. This theory is based on Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed.2d 106, 112 (1980)("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land."(citations omitted)). Admitting that this claim does not involve a per se taking (that is, a physical taking or a regulation denying all economically beneficial or productive use of land) which would require a strict scrutiny analysis, plaintiff contends the trial judge should have made an "inquiry into the public purpose supposedly served by the restraint."

The judge acknowledged the taking issue had been briefed, but was "not prosecuted at trial," and therefore stated that he did not consider it. It is clear from Judge Guteri's opinion that the issue he did not consider was

"whether the ordinance challenged here deprived the plaintiff of economically viable use of its land." However, plaintiff's taking argument related to the public purposes served by the zoning regulations, repeated during oral argument, was considered by the judge. He rejected plaintiff's arguments that the EP-250 zoning was unnecessary to protect the environment. Instead, he held "there was no direct regulation of wetlands," but it was proper for the municipality to take account of the existence of wetlands in the zone. The judge specifically noted the municipality's concerns about "wetlands, floodplain, seasonal high water tables, open water, and steep slopes." He held the "multiplicity of factors" established "a rational nexus to the provisions of the EP-250 zone," justifying its passage. He concluded the ordinance was not arbitrary, unreasonable or capricious as applied to plaintiff's property, and that plaintiff had not overcome the presumption of validity just because its property had the potential to be "developed at a higher density without environmental detriment."

The judge also noted there was some support in the record for the view that "few of the environmental concerns which justified the passage of the ordinance apply to this apparently unique piece of property. He directed plaintiff to apply for a use variance from the Board of Adjustment before he made a definitive ruling. We have some reservations about the need to seek a variance, but conclude it unnecessary to decide this issue because we sustain the constitutionality of the ordinance. We note that ordinarily an application for a use variance to permit construction of between eight and fifteen houses instead of four, would effect a de facto rezoning of a twenty-nine acre tract. The Board of Adjustment lacks the power to make such a ruling, and the applicant should petition the Planning Board to recommend an amendment to the zoning ordinance that would provide the relief it seeks. See Feller v. Fort Lee Bd. of

Adj., 240 N.J. Super. 250, 256-57 (App. Div. 1990), certif. denied, 127 N.J. 325 (1991); Chesterbrooke Limited Partnership v. Pl. Bd. of Twp. of Chester, 237 N.J. Super. 118 (App. Div.), certif. denied, 118 N.J. 234 (1989).

Accordingly, except for these brief explanations, occasioned by oral argument, we affirm essentially for the reasons expressed by Judge Guterl in his thoughtful, thorough and well reasoned written opinion.

Affirmed.

[APPENDIX E. APPELLATE DIVISION ORDER GRANTING PETITIONER'S MOTION FOR RECONSIDERATION]

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A -002269-95T3
MOTION NO. M-004898-96
BEFORE PART: H
JUDGE(S): BAIME
LEVY
BRAITHWAITE

PHEASANT BRIDGE CORP
VS
THE TOWNSHIP OF WARREN

MOTION FILED: APRIL 01, 1997 BY: PHEASANT BRIDGE CORP

ANSWER(S) FILED:

SUBMITTED TO COURT: APRIL 07, 1997

ORDER
(Filed April 24, 1997)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 24th DAY OF April, 1997, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION BY APPELLANT - FOR RECONSIDERATION	(x)	( )	( )

SUPPLEMENTAL:

The motion for reconsideration is granted. The opinion dated March 27, 1997, is hereby withdrawn. Substitute opinion to be filed.

SOM L-127-94 FOR THE COURT

s/ David S. Baime

JULAG David S. Baime J.A.D.

[APPENDIX F. SECOND OPINION AND JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, ON PETITIONER'S APPEAL]

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2269-95T3

PHEASANT BRIDGE CORP., a corporation of the State of New Jersey,

Plaintiff-Appellant,

-v-

TOWNSHIP OF WARREN, a municipal corporation of the State of New Jersey,

Defendant-Respondent.

Argued: March 19, 1997 - Decided: March 27, 1997
Motion for Reconsideration Granted: April 24, 1997-
Decided: APR 2 5 1997

(Filed April 25, 1997)

Before Judges Baime, P.G. Levy and Braithwaite.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County.

Joseph E. Murray argued the cause for appellant (Joseph E. Murray & Associates, P.A., attorneys; Mr. Murray, of counsel; Jay B. Bohn, on the brief).

Timothy P. Beck, argued the cause for respondent (Bivona, Cohen, Kunzman, Coley, Yospin, Bernstein & DiFrancesco, attorneys; Mr. Beck, on the brief).

PER CURIAM

Warren Township rezoned more than 800 acres into an EP250 zone in 1993. Plaintiff had purchased twenty-nine acres in 1986 when its tract was zoned for one and one-half acre residential lots. It solved its sewer problem and was granted reserve capacity holder status, but then the municipality changed the zoning. The rezoning reduced the economic development yield from between eight to fifteen lots to only four lots. Plaintiff brought suit in the Law Division, claiming that the new ordinance was facially unconstitutional, unconstitutional as applied to its property, and was an unconstitutional taking of its land.

The trial judge held the ordinance was facially valid because plaintiff failed to prove it was "clearly arbitrary, capricious, or unreasonable, or plainly contrary to fundamental principles of zoning or the [Municipal Land Use Law]." The judge did not address plaintiff's claims that the ordinance was unconstitutional as it applied to plaintiff or that it constituted an unconstitutional taking. The judge found that the "as applied" challenge was premature because plaintiff had not sought a zoning variance. The judge apparently concluded that plaintiff's "taking" argument had not been fully prosecuted.

Plaintiff now appeals. We affirm so much of the Law Division's judgment that encompasses the judge's finding that the ordinance is facially constitutional. We remand for further proceedings to determine whether the ordinance is unconstitutional as applied or constitutes an unlawful taking of plaintiff's property.

Plaintiff claimed that even if the ordinance was not arbitrary or not unreasonable, the EP-250 zoning regulations failed to substantially advance a legitimate state purpose and thus constituted a taking, without regard to the economic effect of the regulation. This theory is based on Agins v. City

of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed.2d 106, 112 (1980)("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."(citations omitted)). Admitting that this claim does not involve a per se taking (that is, a physical taking or a regulation denying all economically beneficial or productive use of land), plaintiff contends the trial judge should have made an "inquiry into the public purpose supposedly served by the restraint."

The judge acknowledged the taking issue had been briefed, but asserted that it was "not prosecuted at trial," and therefore stated that he did not consider it. There is sufficient evidence in the record for the trial judge to determine whether plaintiff proved that the EP-250 zone did not substantially advance a legitimate state interest and thus effect a taking. Ibid. A remand is required for consideration of this issue.

The judge also noted there was some support in the record for the view that "few of the environmental concerns which justified the passage of the ordinance apply to this apparently unique piece of property." He directed plaintiff to apply for a use variance from the Board of Adjustment before he made a definitive ruling. We note that ordinarily an application for a use variance to permit construction of between eight and fifteen houses instead of four, would effect a de facto rezoning of a twenty-nine acre tract. The Board of Adjustment lacks the power to make such a ruling, and an applicant seeking rezoning should petition the Planning Board to recommend an amendment to the zoning ordinance that would provide the relief it seeks. See Feiler v. Fort Lee Bd. of Adj., 240 N.J. Super. 250, 256-57 (App. Div. 1990), certif. denied, 127 N.J. 325 (1991); Chesterbrooke Limited Partnership v. Pl. Bd. of Twp. of Chester, 237 N.J. Super. 118 (App. Div.), certif. denied, 118 N.J. 234 (1989).

However, to determine whether the enactment of the EP-250 zone, as applied to plaintiff's property, was arbitrary and capricious, application for a variance or a re-zoning is not a pre-requisite for the courts consideration. This challenge should also be considered on remand.

Accordingly, the matter is remanded to the trial judge for further consideration of the remaining taking claim and the as applied constitutional challenge to the ordinance.

Affirmed in part and remanded for further proceedings. We do not retain jurisdiction.

[APPENDIX G. FIRST OPINION OF LAW DIVISION ON REMAND (TAKINGS ISSUE)]

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY

CIVIL ACTION

DOCKET NO. SOM-L-127-94 PW

PHEASANT BRIDGE CORPORATION, a corporation of the State of New Jersey

Plaintiff

vs.

TOWNSHIP OF WARREN, in Somerset County, a municipal corporation of the State of New Jersey

Defendant

DECISION ON REMAND

This matter comes to this Court on remand from the Appellate Division after a successful application by Pheasant Bridge for reconsideration. The trial Court has been directed to rule on the argument of Pheasant Bridge that the provisions of Ordinance 93-24 relating to the EP-250 zone are unconstitutional as they apply to plaintiff's property. The trial Court's previous determination that Ordinance 93-24 is facially constitutional was affirmed by the Appellate Division. This Court, in accordance with the direction on remand, has

considered the limited issue of whether Ordinance 93-24 is unconstitutional as applied or constitutes an unlawful taking of plaintiff's property and has resolved the question in the affirmative.

It is worthwhile to repeat, from the trial opinion, the history of the controversy as well as the contentions of the parties at trial.

On December 28, 1986, Plaintiff Pheasant Bridge Corporation, hereinafter "Pheasant Bridge," purchased 28.98 acres of township land (designated as lot 9.01 in block 198 on the tax map) abutting the Passaic River. At the time of the purchase, the land was zoned to require a minimum lot size of 1.5 acres. However, Pheasant Bridge was unable to build on its land at the time, for there was no capacity in the sewerage system to accommodate Pheasant Bridge and it seemed clear that the high water table on the property would have made construction of adequate septic systems on one and one half acre lots difficult, if not impossible. During the approximately seven years that followed, Pheasant Bridge successfully attempted to resolve the sewerage capacity issue that delayed construction. Part of this exercise was the paying of $42,000 to the Warren Township Sewerage Authority to participate in the Warren reserve sewerage capacity program. The subject property therefore now has sewer access while it is apparently not otherwise available throughout the EP-250 zone.

On December 2, 1993, allegedly in response to a variety of environmental conditions that affected lands in the Township, Warren adopted Ordinance 93-24, which created the EP-250 zone. Among those described conditions which allegedly justified Ordinance 93-24 are open water, 0-1 foot depth seasonal high water tables, wetlands and wetlands buffers, steep slopes exceeding 19 percent grades, and 100 and 500 year floodplain. The zone includes Pheasant Bridge's

property together with an additional 778 acres of land along the northerly line of Warren. The new zone included a minimum lot size of six acres for a structure in the zone. Given the new acreage requirement, Pheasant Bridge may develop no more than four lots. Under the former zoning scheme, Pheasant Bridge could enjoy a yield of 8 to 15 lots on its property.

Prior to these 1993 zoning changes, in 1989 the Warren Planning Board had adopted a Master Plan which was influenced by a survey of Warren residents and which encouraged strongly and repeatedly the preservation of the remaining undeveloped lands in the Township. The lot size changes in the EP-250 district are said to be justified in the Master Plan by virtue of the presence of subsurface rock formations which would require 1 to 3.95 acres to provide for an individual septic system. The plaintiff contends, in response, that while a high water table is said to characterize the EP-250 district, it does not preclude construction of a home where sanitary sewers are available. Wetlands are said to be a further reason for constraint on development of lands in the EP-250 district, but the relationship is not explained in the Master Plan or the Zoning Ordinance. The parties agree that the amount of wetlands on the subject property is still unknown, although generally believed to be more than 15%. While steep slopes are another mentioned constraint on development in the district, the witnesses agreed that the Pheasant Bridge's property has no steep slopes and there are few throughout the EP-250 zone. Finally the presence of flood plains in the district is described as an added reason for constraint on development.

This Court originally concluded that the record did not support a finding that the regulations contained in Ordinance 93-24 were unnecessary to protect the environment. Warren was found to have acted properly when it established the EP-250 Zone, and the multiplicity of factors that were included in

Warren's defense were seen as justifying the passage of the EP-250. At the same time this Court considered the arguments advanced now by Pheasant Bridge and agreed there was some evidence to support the contention that it amounted to a taking of the plaintiff's property, given the fact that few of the environmental concerns which justified the passage of the ordinance apply to this apparently unique piece of property. That issue was not resolved by the Court in part because the Court suggested an application to the Board of Adjustment as an alternate remedy and partly because it was considered abandoned by Pheasant Bridge. The issue is more fully considered now by direction of the Appellate Division.

There are fewNew Jersey cases which are cited by either side. A review of the extensive federal decisions on the subject of such "taking", as has been alleged by Pheasant Bridge to have resulted here, is necessary. This historical analysis reveals that generally prior to the mid 1980's, the court tended to be more supportive of the governmental body that passed the ordinance. Thereafter, the Court has taken a more property - protective attitude. Not surprisingly, Warren relies heavily upon United States Supreme Court decisions prior to the 1980 while Pheasant Bridge, for the most part, relies upon Supreme Court cases that are generally 1980 or later.

Both Warren and Pheasant Bridge agree that, in order not to be found a taking of plaintiff's property for which just compensation is required, the ordinance must substantially advance a legitimate state interest. Individual property rights are a fundamental principle of American democracy, but they are not absolute. The rights of citizens to use their property have always been limited when necessary to protect the health, safety, and public welfare at large.

The state has the inherent power to appropriate

private property for the promotion of the general welfare of its citizens. This is the basis for eminent domain authority and condemnation procedures in which the government pays the fair market value for property that is physically taken for government purposes, or for limiting government authority outside the exercise of ordinary powers. However, just as private property rights are not absolute, neither is the exercise of the state's powers absolute.

The rationale that government restrictions can go too far and be an "unconstitutional regulatory taking" finds its basis in Pennsylvania Coal Co. v. Mahon, 26 U.S. 393 (1922). Justice Oliver Wendell Holmes authored the decision for the Court which held that a land use regulation can be unconstitutional under the U.S. Constitution. Justice Holmes began his opinion for the majority by stating that, "if we were called upon to deal with the plaintiffs position alone, we think it clear that the statute does not disclose a public interest sufficient to justify so extensive a destruction of the defendant's constitutionally protected rights." Pennsylvania Coal at 414. The Court noted that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.[1] But obviously the implied limitation must have its limits, or the contract and due process clauses are gone."

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[1]In Mulger v Kansas, 123 U.S. 623, the Court upheld a Kansas statute that prohibited the manufacture of intoxicating liquors. The Court applied a substantive due process test but declared that the Fourteenth Amendment's due process clause was not "designed to interfere with the power of the States, sometimes termed police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. Mulger at 663.

Pennsylvania Coal Co. at 413.

Thus, despite the Supreme Court's approval of the police power[2] and its decision not to consider how "oppressive" were the regulations upheld in previous cases, such as Reinman[3] and Hadacheck,[4] the Court proceeded in Pennsylvania Coal to strike down a state statute forbidding the mining of coal in certain areas so as to cause subsidence of the surface.

This case is noteworthy because it set a posture for the Court that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.

Here we are to determine whether Warren Township

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[2]The Court said, the police power of the States "cannot be burdened with the condition that the State must compensate... individual owners of property for pecuniary losses they may sustain, by their not being permitted, by a noxious use of their property, to inflict injury on the community. Mulger at 669.

[3]In Reinman v. City of Little Rock, 237 U.S. 17 (1914), the Court upheld an ordinance prohibiting the operation of livery stables in downtown Little Rock, asserting that the only constitutional limitation on the police power of the states is that it cannot be exercised arbitrarily or with unjust discrimination.

[4]In Hadacheck v. Sebastian, 239 U.S. 394 *(1915)*, the Court sustained a Los Angeles ordinance prohibiting the manufacture of bricks in a designated part of the city where Hadacheck owned a brick factory and a valuable deposit of brick clay. The Court did not directly address Hadacheck's allegation (supported by affidavit) that the ordinance reduced the value of his land from $800,000 to $60,000. Instead, the Court declared, [w]e are dealing with one of the most essential powers of government, one that is the least limitable. If may, indeed seem harsh in its exercise, usually is on some individual, but the imperative necessity for its exercise precludes any limitation upon it when not exerted arbitrarily. The Court further noted, [t]here must be progress, and it in its march private interests are in the way, they must yield to the good of the community.

improperly overstepped its regulatory taking authority. Pheasant Bridge finds strong support for its position in the next major case decided by the Court. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court sustained the then new zoning technique for regulating urban land uses in principle as against a substantive due process challenge, based on the argument that land use regulation by zoning was inherently arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. The Realty Company argued that the Euclid ordinance reduced the value of its property so greatly as to amount to a de facto taking, but the Court ignored this argument. Likewise, here Warren believes that while the value of the plaintiff's property will diminish, this Court should dismiss that argument. The Court agrees that the diminishment of value of the property of Pheasant Bridge is of no weight in this consideration.

Further, the goal of preserving the land in the face of increasing population was first adopted by the Euclid Court and, in this case, by Warren. The Euclid Court noted that "[u]ntil recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, additional restrictions in respect of the use and occupation of private lands in urban communities." Euclid at 386, 387.

The Court also stated that "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." Euclid at 387. The Court further noted that "a decree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes, ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the

Constitution" Euclid at 387.

The Supreme Court has not established any comprehensive measurement to determine if a taking has occurred in all cases. Rather, it varies with the situation and the land restriction ordinance or similar law must find justification in some aspect of the police power, asserted for the public welfare. Euclid at 387. "A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities." Euclid at 387.

The next major case decided the Court and cited by Warren was Nectow v. Cambridge. 277 U.S. 183 (1928). In Nectow, a zoning ordinance divided the city into three kinds of districts, residential, business, and unrestricted. Nectow at 185. The land of the plaintiff in error was put in the wrong district. The state Court sustained the ordinance as applied to plaintiff in error, and dismissed the bill. Nectow at 186.

The United States Supreme Court reversed. It was clearly evident that the ordinance did not substantially advance legitimate States' interests and therefore, was improper as applied to plaintiff's property.[5] Thus, the test used by the courts to effect a taking of plaintiff property was that a particular ordinance clearly must advance a legitimate State interest. Here and in future cases, Plaintiffs had to clearly demonstrate that the ordinance did not advance legitimate state interest(s). Otherwise, the governing body was generally successful.

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[5]Here, the Court said that the evidence clearly showed that the invasion of plaintiff's property rights by the residential use classification was "serious and highly injurious," and since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained. Nectow at 188.

This position was reaffirmed in another major case, Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138 (1980), wherein the plaintiff contended that the "city had 'completely destroyed the value of [appellants'] property[6] for any purpose or use whatsoever . . . ." Agins at 2140. The only question before the Court was whether the mere enactment of the municipal zoning ordinances constituted a taking without just compensation in violation of the Fifth and Fourteenth Amendments.[7] Agins at 2141.

The Court reasoned that the ordinances substantially advanced a legitimate governmental goal. "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." Agins at 2141. The question necessarily requires a weighing of public and private interest. Agins at 2141. The Court noted that the specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization. Agins at 2142. Additionally, it was further noted that such governmental purposes long have been recognized as legitimate Agins at 2142.

Similarly, the Pheasant Bridge property is not the only property impacted by the zoning. Rather, the indicated

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[6]The complaint in the case alleged that land in Tiburon had greater value than any other suburban property in the State of California. The property provided magnificent views of San Francisco Bay and the scenic surrounding areas [and] have the highest market values of all lands in Tiburon. Agins at 2140.

[7]The complaint in the case alleged that land in Tiburon had greater value than any other suburban property in the State of California. The property provided magnificent views of San Francisco Bay and the scenic surrounding areas [and] have the highest market values of all lands in Tiburon. Agins at 2140.

benefits, would also benefit Pheasant Bridge's property. The Township seems to have set up a plan to orderly develop the EP-250 zone. Notwithstanding this similarity, Pheasant Bridge's reliance on Agins is persuasive. Indeed, a major factor considered by courts in a taking analysis is whether the ordinance substantially advances a legitimate state interest. In Agins, it was determined that the features tied to the passage of the ordinance did touch the plaintiff's property. Therefore, the plaintiff claim was not supported.[8]

However, as determined previously by this Court, the key environmental features associated with the Warren Township ordinance do not seem to touch the property of Pheasant Bridge. This is a key test that must be decided.

Warren also cites Penn Central Transportation Co. v. New York City, 438 U.S. 104, S.Ct. 2646 (1978).[9] Warren is correct in its cite of Agins that references Footnote 36 in Penn

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[8]The Supreme Court did not consider whether the zoning ordinances would be unconstitutional if applied to prevent appellants from building five homes." Agins at 2141. Because the appellants did not submit a plan for the development of their property as the ordinances permit, there is yet no controversy regarding the application of the specific zoning provisions. Agins at 2141. However, it was decided by the California Supreme Court that appellants may be permitted to build as many as five houses on their five acres of prime residential property. Agins at 2142.

[9]In the Court's discussion of the Fifth Amendment, it admits "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Penn Central at 2659. However, the Court noted its previous decisions that have identified several factors that have particular significance in taking analysis. These include 'the economic impact of the regulation on the claimant and, particularly the extent to which the regulation has interfered with distinct investment-backed expectations . . . [s]o, too, is the character of the governmental action." Penn at 2659

Central. However, a reading of the footnote doesn't seem to provide meaningful support to Warren's argument. Specifically, it is not clear how circumstances in Pheasant Bridge can so change that may be similar to Penn Central that would provide relief for appellant. Agins at 2141 and Penn Central at 2666, Footnote 36.

Penn Central seems to be the last Supreme Court case cited by Warren that specifically deals with taking. Thereafter, the cases seem to favor Pheasant Bridge and are not surprisingly cited only by Pheasant Bridge. An historical analysis of major Supreme Court cases in this area reveals a shift by the Court that generally occurred after 1980. The following cases reveal a shift toward the rights of the property owner.

Until the late 1970s it was generally assumed that, even if land use regulations were found to effect an uncompensated "taking" only specific relief such as a declaratory judgment, an injunction, or mandamus was available to the victorious plaintiff. Beginning with San Diego Gas & Electric Co. v. City of San Diego, 101 S.Ct. 1287 (1981), however, the Supreme Court indicated that, in an appropriate case, it would be willing to address the question whether compensation should be awarded for a "regulatory taking" instead of, or in addition to, specific relief. In San Diego Gas, the Court eventually dismissed the appeal on the basis that it lacked jurisdiction since there was no final California Court judgment. The Law of Property 2nd Edition, Cunningham, Stoebuck, Whitman, 1993.

The position of Pheasant Bridge is supported by First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 107 S.Ct. 2378 (1987). In First English, the Court took the next step when it adopted the rationale of Justice Brennan's dissent in San Diego Gas. The Court held that the Fifth Amendment as made applicable to the states by

the Fourteenth Amendment, mandates payment of just compensation for a regulatory taking. First English at 2385 - 2387.[10] In speaking for the 6 - 3 majority, Chief Justice Rehnquist further noted,

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and government bodies of municipal corporations when enacting land use regulations. But such consequences necessarily flow from any decision upholding a claim of "constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and Just Compensation Clause of the Fifth Amendment is one of them.

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[10]The posture of the parties in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, was such that compensation could neither have been sought nor awarded. Compensation was not sought in Euclid v. Ambler Realty Co. 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). In Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), Justice Brennan said in a footnote that "[a]s is implicit in our opinion we do not embrace the proposition that a 'taking' can never occur unless government has transferred [sic] physical control over a portion of a parcel," but it is not clear whether the majority thought compensation might be payable for a "regulatory taking." No compensation was sought in Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct.3141, 97 L.Ed.2d 677 (19877). In Agins v. City of Tiburon, 24 Cal.2d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), it was held that land use regulations that "went too far" could not amount to "takings" and, consequently, that no compensation could be granted when regulations "went to far." On the other hand, compensation was awarded for a "regulatory taking" in Gordon v. City of Warren, 579 F.2d 386(6th Cir. 1978), Arastra Limited Partnership v. City of Palo Alto, 401 F.Supp. 962 (N.D. Cal. 1975) and City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978). The Law of Property 2nd Edition, Page 522, Note 60 (in Part) Cunningham, Stoebuck, Whitman, 1993.

First English at 2389.

Pheasant Bridge also finds support in Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987). The key issue revolved around the commission granting a permit to the Nollans to replace a small house on their beachfront lot with the building of a larger house upon the condition that the Nollans would also be burdened with an easement that would allow beach goers a seemingly better access to the beach front by crossing a portion of the Nollan's property.

The majority of the Court reasoned, "[i]t is impossible to understand how it lowers a 'psychological barrier' or how it helps to remedy an additional congestion on them caused by construction of the Nollan's new house." Nollan at 3149. The majority Court concluded that the San Diego Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.[11]

The applied test in this case is noteworthy because it delineates the scope of constitutional limitations on governmental authority to specific conditions in exchange for discretionary, judgmental, or arbitrary, public welfare uses of land

As in Pheasant Bridge v. Township of Warren, the nexus of Warren's reason for enacting the challenged ordinance to the stated purpose of the ordinance seems illusory. For example, in Nollan, the defendant states a number of reasons for the passage of the ordinance. However, a proper nexus between enacting the provision and

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[11] The Court noted that land use-regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and den[y] an owner economically viable use of land. Nollan at 3147 (quoting Agins v. Tiburon, 447 U.S. 255, 260). The Court also reiterated 'that a broad range of governmental purposes and regulations satisfies these requirements

the burden on access was missing.

So too, the nexus for the change from 1 acre to 6 acres in Pheasant Bridge v. Warren, as applied to plaintiffs property, seems to be missing. Essentially, the key test in Nollan is the Court's . . . demand for a precise match between the condition imposed and the specific type of burden on access created by the appellants . . . ." Nollan at 3155.[12] It was lacking there and seems absent here as well.

Another cited case by Pheasant Bridge is Dolan v. City of Tigard, 114 S.Ct. 2309 (1994). In Dolan, the Supreme Court granted certiorari because of an alleged conflict between the Oregon Supreme Court and its decision in Nollan. Dolan at 2316. Petitioner appealed on the ground that the city's dedication requirements of a part of plaintiff's property constituted an uncompensated taking of their property under the Fifth Amendment. Dolan at 2315. The question before the court was whether the findings of the enactment are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit.

In analyzing the question before High Court, the Court considered the three major types of decisions that state courts have reached in the area of taking: [1] "very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice . . . [2] Other courts require a very exacting correspondence, described as the 'specifi[c] and uniquely attributable' test . . . [3] an intermediate

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[12]The Court recognized that [the Commission might well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program, . . . if it wants an easement across the Nollans' property, but it must pay for it. Nollan at 3151.

position requiring the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development.

Rather than adopting any of the three, the Court thought "a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment." Dolan at 2319. The Court concluded that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related in nature and extent to the impact of the proposed development. Dolan at 2319.[13]

In light of this clarification in Dolan, the "as applied to my property" test strongly favors the position of Pheasant Bridge.

This seems to add more weight to Pheasant Bridge's position that, if the ordinance is valid, it constitutes a regulatory taking of plaintiff's property for which just compensation must be paid.

There is no dispute about the purpose of the EP-250 zone. In fact, the designation EP stands for "Environmental Protection". The Master Plan described the purpose: " It is meant to guarantee the protection of the environmentally sensitive features which are predominant in this area, to insure the continuation of this area as open space and recreation, promote agricultural retention where appropriate, and maintain the predominantly rural character." MP 95, ppra 53. In the original decision in this matter, the Court noted that

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[13]Chief Justice Rehnquist differentiated a concern of Justice Stevens who took the Court to task for placing the burden on the city to justify the required dedication. Chief Justice Rehnquist stated that here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rest on the city. Dolan at 2320, Note 8.

the environmental concerns which, in part, justified the passage of the ordinance did not apply to the property of Pheasant Bridge. The presence of wetlands was among the reasons for the passage of the offending ordinance, yet they are already heavily regulated and the field has been pre empted by the State. Flood plains are regulated by both Warren and the State of New Jersey. The existing regulations appear completely adequate and the need for or even the advantage of; a six acre minimum lot size, was never clearly articulated. Warren also alleged that the presence of a high water table was a supporting factor as well, but the effect of that condition is lessened substantially by this property's access to sanitary sewers. While there are other concerns from a high water table, such as wet basements, those problems are readily avoided. Warren's concern over properties with steep slopes has no application to the property since it contains no steep slopes. The purposes of Ordinance 92-24 advanced by Warren are therefore not served by the application of the ordinance to the property of Pheasant Bridge.

In short, the provisions of Ordinance 93-24, as they apply to the property of Pheasant Bridge, do not meet the test set forth in Agins, supra, in that Pheasant Bridge has demonstrated it does not substantially advance a state interest. It may well be that it is a good idea for Warren to limit development as intended by Ordinance 93-24, but that does not establish the right to extract the cost from Pheasant Bridge. Nollan, supra. The only purposes for establishing the EP-250 zone which have application to the property of Pheasant Bridge are the goals of ". . . . continuation of this area as open space and recreation . . . and maintain the rural character". The presence of those references in the Master Plan has not been the subject of argument in this matter. Such language suggests the goal of the ordinance is maintenance of the status quo. Since the property is now

vacant, one apparent goal of the EP-250 requirements was the maintenance of the property in its vacant state. Few residents of Warren would quarrel with that goal, but if Warren intended to preclude all development of the property by these provisions, should Pheasant Bridge be made to pay the cost? In the circumstances of this case such a goal is not seen as a sufficient basis for the passage of Ordinance 93-24 under Agins, supra. Furthermore, authority is generally seen as lacking for the establishment of lot sizes which are not supported by the requirement necessary to accommodate septic and water systems. Zoning and Land Use Administration, p-599, William M. Cox, Gann 1997..

Warren has submitted additional arguments which are founded on recent amendments to the Master Plan. For example, Warren has recently added the argument that the offending provisions of Ordinance 93-24 are justified by a desire to preserve farm land and six acres is the appropriate size under the Farmland Assessment Act. On its face that argument seems contrived because of its late arrival and its omission from the very substantial Master Plan adopted by the Planning Board. Furthermore, the soils map for the EP-250 zone shows the soil is ill suited for farming. Since it was not advanced at trial nor mentioned at the time the ordinance was enacted, it will not be further considered.

The Court therefore concludes that, as applied to the property of Pheasant Bridge, the provisions of Ordinance 93-24 fail to advance a legitimate state interest and therefore constitutes a taking for which just compensation must be paid.

Both Parties make extensive argument regarding the Court's position in Lucas v. South Carolina Coastal Council. 112 S.Ct. 2886 (1992). The Supreme Court stated that Lucas was not ripe for review insofar as the petitioner sought compensation for a "permanent regulatory taking."

However, the Court held that the question whether there was a "temporary regulatory taking" during the period between initial enactment and amendment of the Beachfront Management Act was ripe for review. This was because the South Carolina Coastal Council had stipulated in the trial court that no building permit would have been issued under the Beachfront Management Act as originally enacted because the taking was unconditional and permanent. Here, it would have been a useless effort on plaintiff's part to apply for a building permit. Lucas at 2891.

In Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659 (1997), plaintiff's "prudential v. jurisdictional" argument is persuasive. The issue before the Court was "whether Suitum's claim of a regulatory taking of her land in violation of the Fifth and Fourteenth Amendments is ready for judicial review under prudential ripeness principle. Suitum at 1664.

The Court noted that Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) detailed two independent prudential hurdles to a regulatory taking claim brought against a state entity in federal court. The plaintiff must demonstrate that she has both received a 'final decision regarding the application of the [challenged] regulations to the property at issue' . . . and sought compensation through the procedures the State has provided for doing so . . . ." Suitum at 1665.

[APPENDIX H. SECOND OPINION OF LAW DIVISION ON REMAND (VALIDITY ISSUE)]

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY

CIVIL ACTION

DOCKET NO. SOM-L-127-94 PW

PHEASANT BRIDGE CORPORATION, a corporation of the State of New Jersey

Plaintiff

vs.

TOWNSHIP OF WARREN, in Somerset County, a municipal corporation of the State of New Jersey

Defendant

OPINION
(PART THREE)
(Filed March 31, 1998)

At the outset it is important to note that this is the third opinion issued by this Court in the instant controversy. It will be helpful, therefore, to review, from the trial opinion, the history of the controversy as well as the contentions of the parties at trial.

On December 28, 1986, Plaintiff, Pheasant Bridge Corporation, hereinafter "Pheasant Bridge," purchased 28.98 acres of township land (designated as lot 9.01 in block 198 on the tax map) abutting the Passaic River. At the time of the purchase, the land was zoned to require a minimum lot size of 1.5 acres. However, Pheasant Bridge was unable to build on its land at the time, for there was no capacity in the sewerage system to accommodate Pheasant Bridge and it seemed clear that the high water table on the property would have made construction of adequate septic systems on one and one half acre lots difficult, if not impossible. During the approximately seven years that followed, Pheasant Bridge successfully attempted to resolve the sewerage capacity issue that delayed construction. Part of this exercise was the paying of $42,000 to the Warren Township Sewerage Authority to participate in the Warren reserve sewerage capacity program. The subject property now has (and has throughout the pendency of this matter) sewer access while it is apparently not otherwise available throughout the EP-250 zone.

On December 2, 1993, allegedly in response to a variety of environmental conditions that affected lands in the Township, Warren adopted Ordinance 93-24, which created the EP-250 zone. Among those described conditions which allegedly justified Ordinance 93-24 are open water, 0-1 foot depth seasonal high water tables, wetlands and wetlands buffers, steep slopes exceeding 19 percent grades, and 100 and 500 year floodplain. The zone includes Pheasant Bridge's property together with an additional 778 acres of land along the northerly line of Warren. The new zone included a minimum lot size of six acres for a structure in the zone. Given the new acreage requirement, Pheasant Bridge may develop no more than four lots. Under the former zoning scheme, Pheasant Bridge could enjoy a yield of 8 to 15 lots on its property.

Prior to these 1993 zoning changes, in 1989 the Warren Planning Board had adopted a Master Plan which was influenced by a survey of Warren residents and which encouraged strongly and repeatedly the preservation of the remaining undeveloped lands in the Township. The lot size changes in the EP-250 district are said to be justified in the Master Plan by virtue of the presence of subsurface rock formations which would require 1 to 3.95 acres to provide for an individual septic system. The plaintiff contends, in response, that while a high water table is said to characterize the EP-250 district, it does not preclude construction of a home where sanitary sewers are available. Wetlands are said to be a further reason for constraint on development of lands in the EP-250 district, but the relationship is not explained in the Master Plan or the Zoning Ordinance. The parties agree that the amount of wetlands on the subject property is still unknown, although generally believed to be more than 15%. While steep slopes are another mentioned constraint on development in the district, the witnesses agreed that Pheasant Bridge's property has no steep slopes and there are few throughout the EP-250 zone. Finally, the presence of flood plains in the district is described as an added reason for constraint on development.

In the original decision this court concluded that: **Given the findings that Warren made, it acted properly when it established the EP-250 Zone.** The opinion will not be repeated here at length but some of the reasoning has application to the issue now before the Court and some repetition is necessary. In the original opinion we concluded that Warren had determined the need for some additional regulation in view of the combination of environmental factors that were present.

> Floodplain, steep slopes, seasonal high water and wetlands are present throughout the EP-250 zone. While steep slopes are admittedly

> not a significant factor, the other factors are all present to a large degree. It is the multiplicity of factors that justified the passage of the EP-250. There was no dispute about the fact that the property abutted the Passaic River, was subject to potential flooding, had a high water table and a substantial amount of wetlands. It was also uncontested that the Pheasant Bridge property had only been used as farmland and in fact was still being used for the harvest of hay. Most of Pheasant Bridge's evidence properly dealt with the application of the new zoning requirements to its own property. While there was no evidence of any steep slopes in the entire EP-250 district, there was no substantial dispute about the general applicability of Warren's concerns through the balance of the district. **The evidence therefore did establish a sufficient rational nexus to the provisions of the EP-250 zone.** (Page 6 or original Opinion)

This matter was subsequently returned to the Court on remand from the Appellate Division after a successful application by Pheasant Bridge for reconsideration of the Appellate Division decision which affirmed the original decision of this Court. The Appellate Division thereafter remanded the matter ***"for further proceedings to determine whether the ordinance is unconstitutional as applied or consititues an unlawful taking of plaintiff's property."*** Thereafter, this Court considered the argument of Pheasant Bridge that the provisions of Ordinance 93-24 relating to the EP-250 zone were *unconstitutional as they applied to plaintiff's property.* That question was resolved with the Court's second decision that determined Ordinance 93-24 to be unconstitutional as applied and constituted an unlawful

taking of plaintiff's property.

At the time of that second decision, this Court found that the provisions of Ordinance 93-24 failed to substantially advance a legitimate state interest and therefore constituted a taking for which just compensation must be paid. It was thought the matter would end there, but that post remand decision provoked further argument in this seemingly never-ending controversy. The Court has been most recently asked to determine whether he same zoning ordinance provisions are *arbitrary as applied to the Pheasant Bridge property.* The Court's original decision included a determination that the subject ordinance was not arbitrary *as applied to the entire affected zone,* Pheasant Bridge now seeks a determination of whether the ordinance is arbitrary *as applied to the property of Pheasant Bridge.*

Pheasant Bridge seeks this ruling because while Warren is presently able to proceed to acquisition of the property based on this Court's second decision and Pheasant Bridge is not free to develop the property. If Pheasant Bridge is successful in the current application, the present zoning of the Pheasant Bridge property would be invalidated and the previous zoning of the property would be restored.

Warren argues, in part, in this third stage that the obligation of uniformity throughout a district and the court's prior finding that the challenged Ordinance EP-250 was the product of a requirement of uniformity throughout a district and Warren's actions were not arbitrary since there was no basis for Warren to be aware that the Pheasant Bridge property was inappropriate for inclusion in the EP-250 zone. Pheasant Bridge disputes the lack of knowledge, but that point is not decisive. The argument, however, is not at all persuasive on the part of Warren. The Pheasant Bridge property was the subject of continuous development attempts over several years so that the property was in the

public eye and its characteristics should have been a matter of common knowledge. Warren also contends that this application should be denied because Pheasant Bridge did not seek a rezoning or variance, an alternative with which the Appellate Division seems to have dispensed. Finally Warren contends that the initial decision upholding the facial validity of the ordinance supports denial of the application.

Pheasant Bridge argues that the declaration of invalidity may be based on any one of the following: (a) the ordinance does not advance one of the purposes of the Municipal Land Use Law (MLUL) as set forth in N.J.S.A. 40:55D-2; (b) the ordinance is not "substantially consistent with the land use plan element or the housing plan element of the master plan or designed to effectuate such plan elements," unless the requirements of N.J.S.A. 40:55D-62 are met; © if the ordinance is not adopted in accordance with statutory and municipal procedural requirements and (d) if the ordinance does not "comport with constitutional restraints on the zoning power, *including those pertaining to due process.*" *Riggs v. Long Beach Tp.*, 109 N.J. 601, 611-12 (1988) (emphasis supplied).

As argued by Pheasant Bridge, the standard is described in more familiar terms in *Berger v. State*, 71 N.J. 206, 223 (1976):

> Nevertheless, while municipalities are free to zone in such a way as will best attain these values, and to prohibit from such areas any use which threatens to erode such values or destroy the residential character of the area, all restrictions must, at the same time, satisfy the demands of due process. Substantive due process requires that zoning regulations be reasonably exercised; they may be neither unreasonable, arbitrary nor capricious.

Warren argues that zoning is required to be done on a district by district basis and the court has already sustained the six acre lot size in its initial decision. But, as contended by Pheasant Bridge, an ordinance may be found to violate the due process standard if it is arbitrary and unreasonable as to a particular piece of property. AMG Associates v. Springfield Tp., 65 N.J. 101, 110 n. 3 (1974); Deal Gardens Inc. v. Loch Arbor Bd. of Trustees, 48 N.J. 492, 497-98 (1967).

At the time of the original decision the rationale for the ordinance was considered. The Court noted the profound effect its provisions had upon the Pheasant Bridge property:

> To be sure, there are aspects of hardship which result from the inclusion of Pheasant Bridge's property in the EP-250 zone. Both Warren's planner and Pheasant Bridge's testified that Pheasant Bridge's property, and in fact all property in the EP-250 district, was devoid of any steep slopes. It was also unclear that the property was located in any flood hazard area. The only environmental constraint to which the property in question was subject, was the high water table which could complicate construction and make a septic system not feasible, but it was undisputed that a building could be safely constructed on the site and sewer access would alleviate any septic system concerns. In fact, it seemed clear that Pheasant Bridge's property had unique access to the sanitary sewers system, a circumstance which could resolve any concerns about all environmental issues. (Supra at page 7)

In that original opinion, this Court acknowledged Pheasant Bridge had argued that the ordinance was invalid

as it applied to its property, but concluded that issue need not be addressed:

> While the plaintiff has contended that the ordinance which enacted the EP-250 zone was invalid, it has also argued that it was arbitrary and capricious as applied to its own property. **There is some evidence to support that view, given the fact that few of the environmental concerns which justified the passage of the ordinance apply to this apparently unique piece of property. That issue is better left to the Board of Adjustment for consideration in a variance application.** This court should not ordinarily decide on the validity of an ordinance until Pheasant Bridge has sought a use variance. Deal Gardens, Inc. v. Board of Trustees of Loch Arbour, 48 N.J. 492.

That conclusion has been explcitly discarded by the Appellate Division which remanded this matter. This Court will therefore belatedly consider the issue of arbitrariness as applied to the property of Pheasant Bridge. No new analysis of the proofs is warranted. The record and review contained in the original decision is clear and complete. Upon further reflection and consideration of the fact findings of this court, this court further finds that Ordinance 93-24 fails to advance a purpose of zoning with respect to the property of Pheasant Bridge and that Ordinance, insofar as it effects the property of Pheasant Bridge, is determined to be invalid. The zoning of this tract of land shall be restored to its zoning under the terms of the ordinance in effect immediately prior to the passage of Ordinance 93-24. This Court continues to retain jurisdiction to consider the remaining issues of compensation for the taking and counsel fees. Counsel for the plaintiff shall prepare an appropriate form of order and shall, by April 30, 1998, file an motion directed to the resolution of the

remaining issues or such issues shall be considered waived.

[APPENDIX I. THIRD OPINION OF LAW DIVISION ON REMAND (COUNSEL FEES)]

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY

CIVIL ACTION

DOCKET NO. SOM-L-127-94 PW

PHEASANT BRIDGE CORPORATION, a corporation of the State of New Jersey

Plaintiff

vs.

TOWNSHIP OF WARREN, in Somerset County, a municipal corporation for the State of New Jersey

Defendant

MOTION BY THE PLAINTIFF FOR COUNSEL FEES
CROSS MOTION BY DEFENDANT FOR DISMISSAL OF PLAINTIFF'S CLAIM
(returnable June 12, 1998)

In this motion. Pheasant Bridge seeks counsel fees as a prevailing party under 42 USC sec. 1983. Pheasant Bridge also relies upon the Eminent Domain Act in this application. Warren cross moves for dismissal of the plaintiff's claim for relief. In its motion Warren contends that Pheasant Bridge never explicitly pleaded a cause of action under section 1983 so it is not entitled to an award of fees under that section.

This matter has a complicated procedural history.

Pheasant Bridge filed its complaint on January 24, 1994. The complaint challenged the validity of Ordinance 93-24 in general and as applied to the property of Pheasant Bridge. After a pre-trial in October of 1994, the matter was tried in August of 1995 and a written opinion issued in October of 1995. In that initial decision, the Court upheld the ordinance as a whole but determined the plaintiff should seek relief by variance before challenging the ordinance as applied to plaintiff's property. After an appeal was filed by Pheasant Bridge, the Appellate Division at first affirmed the entire decision but later reconsidered and affirmed the judgement only as to the facial validity of the ordinance and reversed on the need for a variance, remanding the matter to the trial court for a determination of the taking issue and the validity of the ordinance as it applies to the property of Pheasant Bridge.

Supplemental briefs were filed and the matter was argued on the remanded issues with a ruling thereon issued on November 21, 1997 finding that the ordinance did not substantially advance a legitimate state interest and was therefore a "taking" for which the Fifth Amendment to the Constitution required just compensation. Subsequently the Court further determined that the ordinance was arbitrary as applied to the Pheasant Bridge property. The Court further ruled that Ordinance 93-24 was invalidated and the Pheasant Bridge lands were subject to the zoning restrictions in place prior to the adoption of that ordinance. Counsel fees were subsequently sought in this application.

Pheasant Bridge is a "prevailing party" under 42 USC sec. 1988. Under that section an award of fees is at least discretionary although it is apparently rarely refused. The fact that the defendant is a municipal body does not warrant a different result. Alsar Technology v. Nutley Bd. of Adjustment, 235 N.J.Super 471, 486 (1989). The Alsar supra decision makes it clear that the good faith or bad faith of a

defendant are not relevant factors, the trial court has little discretion. p488-489. While a case could be made that Warren acted in bad faith, when the entire history of this matter is considered Pheasant Bridge did not make that argument and this Court views the issue as not relevant to this determination.

Warren argues that Pheasant Bridge did not cite sections 1983 or 1988 in its pleadings, but, as Pheasant Bridge persuasively argues, it did cite the source of the substantive rights which were violated by the action of Warren and that is sufficient. Pheasant Bridge also moves for amendment of its pleadings and pre trial order to conform to the evidence. Such an amendment is not seen as necessary, although the court is inclined to grant it under R4:9-2. The right to legal fees derives from the violation of substantive federal rights. The lack of specific pleadings on the subject of entitlement to fees did not prejudice Warren. The potential for an award of counsel fees was discussed even before the Court made its determination and no objection was raised as to the insufficiency of the pleadings on this point. This Court finds that Pheasant Bridge pleaded and proved that it was deprived of a federal right under color of state law and an award of fees is therefore warranted. Gomez v. Toledo, 446 U.S. 635 (1980). The Court has also considered the fact that section 1983 was intended to be remedial and the history of this matter warrants liberal application of this law.

The certifications submitted in support of this application appear to be fair and reasonable and the fees sought appear justified. This litigation has been vigorously and competently prosecuted and defended. It is a complex matter which warranted substantial research and able writing and argument, all of which were provided in large measure by both sides. The fees are consistent with that.

Warren has objected to the form of order and raised

several issues which should be addressed. First, the effective date on which the regulatory taking is terminated is the date of this decision. Secondly, the opposition to fees for the entire lawsuit, including the challenge to facial validity, should have more appropriately been made at or before the motion on fees rather than over the form of order. Furthermore, the defendant has not identified any of the work set forth in the certification which should not be allowed as being unrelated to the claim on which the plaintiff has prevailed. While the argument is made late, it would have been more persuasive if Warren had made some attempt to separate the fees which it feels should not have been considered for an award.

Thirdly, since the Court has found that the action of Warren has amounted to a taking, the Eminent Domain Act requires an appraisal of the property and negotiation in good faith. N.J.S.A. 20:3-6. Warren shall proceed to do so within 45 days.

Warren's motion for dismissal is DENIED, for the reasons set forth above. Pheasant Bridge's motion for Counsel Fees is GRANTED. The plaintiff is awarded counsel fees of $79,310, expert fees of $7,392.98, costs and expenses of $3,000 for a total of $89,702.98.

[APPENDIX J. LAW DIVISION JUDGMENT ON TAKINGS CLAIM, AS APPLIED VALIDITY AND AWARDING COUNSEL FEES]

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Attorneys for plaintiff Pheasant Bridge Corp.
Our File No. 2913

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY

CIVIL ACTION

DOCKET NO. SOM-L-127-94 PW

PHEASANT BRIDGE CORPORATION, a corporation of the State of New Jersey,

Plaintiff,

vs.

TOWNSHIP OF WARREN, in Somerset County, a municipal corporation of the State of New Jersey,

Defendant.

FINAL JUDGMENT

(Filed July 17, 1998)

This matter having been opened to the court by remand from the Appellate Division for the purpose of adjudicating the plaintiff's takings claim and its "as applied"

challenge to the EP-250 zone regulations of defendant's Ordinance 93-24, plaintiff being represented by Joseph E. Murray & Associates, P.A. (Joseph E. Murray appearing) and defendant being represented by Bivona, Cohen, Kunzman, Coley, Yospin, Bernstein & DiFrancesco, P.A. (Timothy P. Beck appearing) and the court having determined that the EP-250 zone regulations of the ordinance constituted a temporary regulatory taking of plaintiff's property and having subsequently determined that this provision of the Ordinance was arbitrary and thus invalid as applied to plaintiff's property, and having determined that plaintiff was entitled to an award of counsel fees, and for the reasons expressed on the record on November 21, 1997 (as to the regulatory taking), March 31, 1998 (as to the "as applied" challenge) and June 12, 1998 (as to counsel fees), and good cause otherwise having been shown, it is, on this 16th day of ~~June~~ July, 1998, ORDERED, ADJUDGED and DECLARED as follows:

Substantive Rulings

1. This court finds and determines that the EP-250 zoning provisions of defendant's Ordinance 93-24 did not substantially advance a legitimate state interest as to plaintiff's property designated as Block 198, Lot 9.10, on defendant's tax map and thus constituted a regulatory taking of that property commencing with the enactment of the Ordinance on December 2, 1993.

2. This court finds and determines that the EP-250 zoning provisions of defendant's ordinance 93-24 are arbitrary and invalid as applied to plaintiff's property designated as Block 198, Lot 9.10, on defendant's tax map.

3. Plaintiff's property designated as Block 198, Lot 9.10, on defendant's tax map, shall continue to be governed by the zoning standards in effect immediately prior to the passage of Ordinance 93-24 until defendant otherwise acts to enact different zoning regulations for it.

4. This declaration of invalidity terminates the regulatory taking of plaintiff's property designated as Block 198, Lot 9.10, on defendant's tax map, as of the date of the entry of this judgment, provided that if the declaration of invalidity is stayed, the taking shall be deemed to continue until the declaration of invalidity becomes operative.

5. Defendant's cross-motion to dismiss is denied.

Counsel fees

6. Plaintiff's counter-cross-motion to amend the pleadings and pretrial order to conform to the evidence tried without objection is granted.

7. In accordance with 42 U.S.C. §1988, plaintiff Pheasant Bridge Corp. is hereby awarded fees and expenses against defendant Township of Warren as follows

a.	attorney fees	$ 79,310.00
b.	costs and expenses + expert fees	$ 10,392.98
Total		$ 89,702.98

and Judgment is hereby entered against defendant Township of Warren and in favor of plaintiff Pheasant Bridge Corp. in that amount.

8. The court has not considered the alternate basis of plaintiff's application for counsel fees, N.J.S.A. 20:3-26(c).

Condemnation Proceedings

9. Within 45 days of the entry of this order defendant shall obtain an appraisal of the just compensation to be paid for the temporary taking herein adjudicated by the court.

10. Within 75 days of the entry of this order, defendant shall make a bona fide offer of just compensation

in at least the amount of its approved appraisal, such offer to be accompanied by copies of all appraisals obtained by defendant for the purpose of determining the amount of the bona fide offer.

11. If the parties are not able to reach agreement on the amount of just compensation for the temporary taking within 30 days of plaintiff's receipt of defendant's bona fide offer, or earlier if the parties agree, the commissioners hereinafter appointed shall conduct proceedings in accordance with the Eminent Domain Act for the purpose of determining just compensation for the taking.

12. Charles Clemens, Esq. (Presiding), Stanley Rizzolo and Kathy Kitchen are hereby appointed commissioners to determine the just compensation to be paid.

13. The four month period for the commissioners to act shall commence upon the expiration of the time fixed in paragraph 11 of this order, or the earlier agreement of the parties.

Miscellaneous

14. The within order constitutes a final judgment and memorializes all outstanding rulings of the court.

15. The court reserves the right to issue a supplementary opinion explaining the bases for the determinations made herein.

16. A copy of this order shall be served upon all parties within 10 days from the entry of this order.

s/ Robert E. Guterl
Robert E. Guterl, J.S.C.

[APPENDIX K. LAW DIVISION ORDER STAYING JUDGMENT PENDING RESPONDENT'S APPEAL]

Our File No.: 89,3479/TPB/kc

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Attorney(s) for Defendant, Township of Warren

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY

CIVIL ACTION

DOCKET NO. SOM-L-127-94 PW

PHEASANT BRIDGE CORPORATION, a corporation of the State of New Jersey,

Plaintiff,

vs.

TOWNSHIP OF WARREN, in Somerset County, a municipal corporation of the State of New Jersey,

Defendant.

ORDER GRANTING STAY OF JUDGMENT PURSUANT TO R. 2:9-5

(Filed October 22, 1998)

THIS MATTER having been brought before the Court on Motion of Bivona, Cohen, Kunzman, Coley, Yospin, Bernstein and DiFrancesco, attorneys for defendant Township of Warren for an Order Staying the Judgment entered by the Court on July 13, 1998, and the Court having considered the papers submitted in support of the Motion and any opposition

submitted thereto, and finding that defendant Warren Township has filed an appeal from this Court's decisions on the matter, and consistent with R. 2:9-5 and for other good cause shown;

IT IS ON THIS 21st day of October, 1998,

ORDERED that the following provisions of this Court's Order of Final Judgment entered on July 13, 1998 are stayed until the conclusion of defendant's appeal of this matter pending in the Superior Court, Appellate Division under docket no. A-27-98T3:

1. The judgment entered in favor of plaintiff Pheasant Bridge Corporation for attorneys fees and costs in the amount of $89,702.98 is stayed without the requirement of the posting of a bond or other security;

2. All condemnation proceedings and appraisals ordered by the Court are stayed until further Order of this Court; and

3. The Court's declaration as to the EP-250 zoning provision's unconstitutionality as applied to the plaintiff's tract and the restoration of the 1.5 acre zoning scheme to the tract, as ordered in this Court's Opinion Part III and in paragraph 3 of the Final Judgment, is stayed pending appeal.

IT IS FURTHER ORDERED that a copy of this Order shall be served on all counsel to this action and on the commissioners designated in the Court's prior Order within ____ days of the date hereof.

s/ Robert E. Guterl
ROBERT E. GUTERL, P.J.Civ.P.

[APPENDIX L. APPELLATE DIVISION OPINION AND JUDGMENT ON RESPONDENT'S APPEAL]

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-27-98T3

PHEASANT BRIDGE CORP., a corporation of the State of New Jersey,

Plaintiff-Respondent,

-v-

TOWNSHIP OF WARREN, a municipal corporation of the State of New Jersey,

Defendant-Appellant.

Argued: November 4, 1999 – Decided: JAN 7 2000
(Filed January 7, 2000)

Before Judges P.G. Levy and Lefelt.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County.

Timothy P. Beck, argued the cause for appellent (Bivona, Cohen, Kunzman, Coley, Yospin, Bernstein & DiFrancesco, attorneys; Mr. Beck, on the brief).

Joseph E. Murray argued the cause for respondent (Joseph E. Murray & Associates, attorneys; Mr. Murray, of counsel; Jay B. Bohn, on the brief).

PER CURIAM

Warren Township adopted Zoning Ordinance 93-24 creating an EP-250 zone which, among other things,

restricted plaintiff's use of its land. Plaintiff filed an action in lieu of prerogative writs challenging the validity of the ordinance and also claiming the use restrictions amounted to a taking of its property.

Initially, the trial judge found the ordinance valid as applied to the district as a whole, but found plaintiff would have to seek a variance before proceeding on its other claims. We affirmed those rulings but noted plaintiff should seek an amendment to the ordinance. On reconsideration, we affirmed the trial judge's finding that the ordinance was facially valid, found a zoning variance application was not necessary and remanded to the trial court for rulings on the takings claim and the "as applied" constitutional challenge.

On remand, the judge repeated his original finding that plaintiff's tract was unique in the EP-250 zone and "few of the environmental concerns which justified the passage of the ordinance" applied to the property. That conclusion rested on the judge's determination that the presence of wetlands and the existence of flood plains are regulated by the State, and those regulations are adequate to protect the public welfare, leaving no articulated nexus or need for six-acre minimum lot size on this tract. Further, concerns about the high water table were resolved because plaintiff had acquired access to public sewers, and steep slopes present elsewhere in the EP-250 zone, were not present on plaintiff's property. He concluded the ordinance resulted in an unconstitutional "regulatory taking" of plaintiff's property since it failed substantially to advance a legitimate state interest.

The judge found the application of the ordinance to plaintiff's property extracted an unfairly high cost from plaintiff by reducing the number of buildable lots from between eight and fifteen to just four, and that such cost is compensable in accordance with Nollan v. California Coastal

Commission, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed.2d 677 (1987). Finally, finding "it would have been a useless effort on plaintiff's part to apply for a building permit," the judge found there was a "temporary regulatory taking," citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1011-12, 112 S. Ct. 2886, 2891, 120 L. Ed.2d 798, 810 (1992). He ordered the township to commence condemnation proceedings under the Eminent Domain Act, N.J.S.A. 20:3-1 to -32, without utilizing a separate complaint as usually required by N.J.S.A. 20:3-8.

Subsequently, the judge considered two other issues: (1) whether the ordinance is arbitrary and capricious as applied to plaintiff, meaning the original zoning of one and one-half acre minimum lot size should be restored to the tract, and (2) whether plaintiff is entitled to an award of counsel fees. The first issue was decided in plaintiff's favor and the original zoning was ordered "restored." The second question was also decided in plaintiff's favor, the court holding that plaintiff was a prevailing party and entitled to fees under 42 U.S.C.A. §1988. Counsel fees of $79,310, expert fees of $7,392.98, and costs and expenses of $3,000, for a total of $89,702.98, were awarded. The judgment was stayed pending defendant's appeal.

On appeal, the Township contends the ordinance did not effect a taking, did not unconstitutionally interfere with plaintiff's property rights and was not a violation of 42 U.S.C.A. §1983. Moreover, the Township contends that plaintiffs were not entitled to counsel fees from the Township. We agree with the Township's contentions and reverse.

The trial judge's conclusions were based on part of the two-prong standard set forth in Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed.2d 106, 111-12 (1980).

The following language is often the focus of a reference to that opinion. "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." (citations omitted). While we agree that an ordinance that "does not substantially advance state interests" is invalid and void, Agins does not explain how the adoption of an invalid zoning ordinance effects a taking. See Bell v. Stafford Township, 110 N.J. 384, 395 (1988). Our jurisprudence on regulatory takings comes from the effect of a facially valid ordinance on a particular tract.

Plaintiff's complaint alleged that even if the ordinance was not found (facially) invalid, the EP-250 zoning "operate[s] to deprive the plaintiff of substantially all of its beneficial and economic use of its ... lands," and therefore it constitutes a taking for which plaintiff demanded "just compensation." That allegation reflects the correct status of the law. Agins found that the ordinance advanced a public interest and, therefore, never decided whether compensation was required if the converse were true. Moreover, Agins cited Nectow v. Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed 842 (1928), as support for its statement that "application of a general zoning law to particular property affects a taking if the ordinance does not substantially advance legitimate state interests." In Nectow, suit was brought seeking a mandatory injunction permitting plaintiff to erect any lawful building without regard to the particular restrictive zoning provisions at issue. Nectow recognized that if the particular zoning provisions were applied to plaintiff's property, there was comparatively little value for the limited uses permitted by the ordinance. Nectow indicated that the invasion of plaintiff's property was serious and highly injurious. Accordingly, there was adverse economic impact present in Nectow. We do not read the brief statement in Agins as

revising the general law controlling regulatory takings.

Restrictions on the use of land do not necessarily result in a taking, even when they reduce income or profits. Gardner v. New Jersey Pinelands Comm'n, 125 N.J. 193, 210 (1991). Not every impairment of value of land constitutes a taking. Washington Market Enterprises, Inc. v. Trenton, 68 N.J. 107, 116 (1975). To this end, mere diminution in value, impairment of marketability of title, or a reduction in profitability are not per se takings. Gardner, supra, 125 N.J. at 210. A taking occurs when a regulation "so restricts the use that the land cannot practically be utilized for any reasonable purpose" or for any economically viable purpose. Morris Co. Land Improvement Co. v. Parsippany-Troy Hills, 40 N.J. 539, 557 (1963).

When a regulation destroys all beneficial use of land, then a court should find a taking has occurred. Washington Market, supra, 68 N.J. at 122. However, even if a landowner can no longer make the most advantageous use of land, there is no taking if there are still several, feasible economic uses for the property. Gardner, supra, 125 N.J. at 215. If regulations are reasonably related to the general welfare, even a severe diminution in value is not a taking, provided a viable use for the land still remains. Id. at 212.

Lack of proof of a taking suffices to resolve this appeal and to uphold the ordinance as applied to plaintiff. In fact, plaintiff purposely did not proffer proof of the value of the alleged taking. In this case, plaintiff does not claim all beneficial use of its property was removed; it simply claims it could have made a more profitable use of its property. Plaintiff rests its appeal on the contention that the municipality's ordinance does not advance a legitimate state interest, and the nature and amount of the taking is not developed.

However, we have also considered the trial judge's

ruling that the ordinance did not advance a legitimate state interest, and we disagree with the judge in that respect. The original decision, holding the ordinance facially constitutional, was based on a finding that among the purposes for its enactment were the preservation of open spaces and the maintenance of the rural character of the area. That determination applied to the entire EP-250 zone, including plaintiff's property. While we respect the judge's conclusions that the property did not suffer from the specific environmental restraints affecting the rest of the EP-250 zone, especially because public sewer service was available to it, the overall judgment of the municipality should be respected where the adopted zoning ordinance complies with the Master Plan.

Pheasant Bridge owns a tract of 28.98 undeveloped acres of land in Warren Township. In 1987, Pheasant Bridge applied to the Warren Township Planning Board for preliminary major subdivision approval. In early 1990, the township adopted a Municipal Master Plan, followed by the adoption of ordinance 93-24 on December 3, 1993. The primary constraints found in the zone were (a) open water; (b) zero through one foot depth to seasonal high water table; (c) wetlands and wetland buffers; (d) steep slopes over 19%; and (e) 100 and 500 year flood plains. The ordinance stated:

> This zone includes areas of significant environmental constraints, as identified on the Environmental Constraints Map contained in the adopted Master Plan of Warren Township dated January 22, 1990. Development standards encourage clustered single-family dwellings. Areas of accessible, and contiguous buildable uplands which are greater than 20 acres are considered appropriate for uses other than strictly large lot single-family residential or clustered single-family

> dwellings. Conditional uses consist of nursing homes, retirement facilities, private membership, non-profit and recreational facilities.

In addition, the ordinance required a minimum six-acre lot size for a lot in the zone, with clustering allowed. That is, there was a variable lot size provision in the ordinance which allowed lot sizes to be decreased in size to forty-thousand square feet provided the remaining lots were increased in size so that the average lot size was six acres. The permitted uses within the zone were single-family detached dwellings, farms, houses of worship, volunteer fire companies and golf courses.

The water course protection areas on the Pheasant Bridge property have not changed since 1988 with such areas usually existing along a stream or river. The EP-250 zone is located north of Mountain Avenue between Mountain Avenue and the Passaic River. Despite expert analysis and testing, the results as to the exact delineation of wetlands on plaintiff's property are not yet conclusive and the final location of the wetlands lines on the property have not yet been determined. When the township created the zone, it re-zoned eight-hundred acres as EP-250. Thus, plaintiff's tract of land constitutes only 3.6% of the land in the EP-250 zone.

Municipalities do not possess an inherent power to zone, but may do so only when permitted by the State under terms delegated to them by the legislature. Riggs v. Long Beach Twp., 109 N.J. 601, 610 (1988). In New Jersey, this means a zoning ordinance must advance one of the purposes set forth in the Municipal Land Use Law ("MLUL"). Id. at 611. Any regulations must also be consistent with the municipal master plan and must comply with constitutional restrictions. Ibid. This ability to zone is granted to municipalities because, "[g]overnment hardly could go on if to some extent values

incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed 322, 325 (1922). For this reason, provided they stay within the legislative guidelines, zoning decisions of a municipality will be given great deference. Booth v. Board of Adj. of Rockaway, 50 N.J. 302, 306 (1967); Kramer v. Board of Adj. of Sea Girt, 45 N.J. 268, 296-97 (1965).

Following the rule of Agins, a court considering a challenged ordinance examines whether there is a conceivable, legitimate state objective and whether the classification selected is rationally related to that objective. U.S.A. Chamber of Commerce v. State, 89 N.J. 131, 158 (1982). Here, the municipality intended the EP-250 zone to protect agriculture and open space. These are consistent with the MLUL. N.J.S.A. 40:55D-2. There were several possible uses for the property specified in the Warren Township ordinance, including farmland, single-family detached dwelling on a minimum of six-acres of land, fire company stations and houses of worship. Thus, the ordinance does not eliminate all uses of the land.

An owner of land is not entitled to the best use of the property. Sporkin v. Stafford Twp., 227 N.J. Super. 569, 571 (App. Div. 1988). However, ordinances should not be enacted such that one property owner bears a burden that should be borne by the public at large. A court must examine whether the ordinance is applied solely to the challenging landowner's property. Agins, supra, 447 U.S. at 262, 100 S.Ct. at 2142, 65 L.Ed.2d at 112. Here, plaintiff's land was not the only land regulated by the ordinance and its size was a very small percentage of the EP-250 zone. It is apparent there was no intent to make plaintiff bear the total burden of preserving open space and farmland.

Municipalities must zone to protect the public health,

safety and convenience and the general welfare. Nectow v. City of Cambridge, 277 U.S. 183, 187-88, 48 S.Ct. 447, 448, 72 L.Ed. 842, 844 (1928). This inherently requires municipalities to consider ecological and environmental concerns when enacting zoning ordinances. Sporkin, supra, 227 N.J. Super. at 571. In fact, a municipality should pay careful attention to the environment since its protection is strong justification for imposing restrictions on the use of land. Gardner, supra, 125 N.J. at 207. One specific reason for zoning, according to the MLUL, is to preserve open space and farmland. EP-250 explicitly targets protection of open spaces and farmland among its purposes.

Municipalities may regulate farmland, Sod Farm Assoc. v. Springfield Twp., 297 N.J. Super. 584, 587-88 (App. Div. 1997), and the protection of farmland and agriculture is a legitimate governmental goal. Agins, supra, 447 U.S. at 261, 100 S.Ct. at 2142, 65 L.Ed.2d at 112. At trial, the township expert testified that one of the intentions of the EP-250 zone was to encourage preservation of farmland. This conclusion is supported by the ordinance which lists farmland as one of the uses of the EP-250 zone. In addition, the six-acre size encourages owners to maintain five acres as farmland for favorable tax treatment. The ordinance lists one of the permitted uses as:

> [f]arming consisting of vegetable growing, the raising or keeping of farm animals such as cows and sheep for commercial purposes, keeping and boarding of horses, including riding stables, tree farming and nurseries.

Up until this point, the Pheasant Bridge property had been used for farming corn and hay.

Consequently, the new regulation did not force plaintiff to change the use of its land. Plaintiff claims this argument of protecting farmland was not advanced until trial

when defendant felt it's other justifications were "irrational." This contention is not valid, though, as there is ample credible evidence that the EP-250 zone was enacted to preserve farmland and to preserve open space in the face of population growth, both of which are valid reasons to enact zoning ordinances. Ibid.; Sod Farm, supra, 297 N.J. Super. at 587-88.

Since the EP-250 zoning regulation advances a legitimate state interest, does not deprive plaintiff of all economically viable use of its land, and is not arbitrary and capricious as applied to plaintiff, it is valid. The judgment of the trial court is reversed and the application of the EP-250 zone to plaintiff's land is reinstated.

[APPENDIX M. RELEVANT PORTIONS OF WARREN TOWNSHIP'S ZONING ORDINANCE AS ADOPTED BY ORDINANCE 93-24.*]

16-8 Schedule of District Regulations.

16-8.1 Schedule.

The schedule of regulations applying to each district entitled Schedule of Area, Yard and Building Requirements, hereinafter referred to as "schedule," is a part of this chapter and is attached hereto.

16-8.2 Intent.

The schedule summarizes the major regulations by zoning district, including lot size, yards, building heights and other regulations that may be easily summarized in tabular form; it is not meant to provide a complete index of all requirements and provisions stated within this chapter.

* * *

SCHEDULE-SECTION 16-8

	Minimum Lot	***	***	***
	requirements	***	***	***
	Area in	***	***	***
Zone	Sq. Ft.	***	***	***
EP-250	6 Acres	***	***	***
***	***	***	***	***

*Omitted portions of sections and Schedule reproduced are indicated by asterisks.

16-9 EP-250 Agricultural-Residential Environmental Protection District

16-9.1 Purpose.

This zone includes areas of significant environmental constraints, as identified on the Environmental Constraints Map contained in the adopted Master Plan of Warren Township dated January 22, 1990. Development standards encourage clustered single-family dwellings. Areas of accessible, and contiguous buildable uplands which are greater than 20 acres are considered appropriate for uses other than strictly large lot single-family residential or clustered single-family dwellings. Conditional uses consist of nursing homes, retirement facilities, private membership, non-profit and recreation facilities.

16-9.2 Permitted Uses.

No building, structure or lot shall be used and no building or structure shall be erected or structurally altered except for the following uses:

a. Single-family detached dwellings.

b. Farming consisting of vegetable growing, the raising or keeping of farm animals such as cows and sheep for commercial purposes, keeping and boarding of horses, including riding stables, tree farming and nurseries. No farm building used to house livestock and farm animals shall be located within 25 feet of a lot line.

c. Church, synagogue or other place of worship, including parish house and Sunday school buildings provided that the lot has a minimum of 6 acres and width of 200 feet and further that no accessory use shall be located within 200 feet of a lot line.

d. Volunteer fire company station provided that the lot has a minimum of six acres and width of 200 feet and further

that no accessory use shall be located within 25 feet of a lot line.

e. Public and private golf courses provided the lot has a minimum of 75 acres and that no structure or parking area is located within 100 feet of a lot line.

16-9.3 Permitted Accessory Buildings and Uses.

Accessory uses customary and incidental to the principal use, including but not limited to those specified. The term accessory use shall not include a business, nor any building or unit not located on the same lot with the principal building to which it is accessory.

a. Private garages and carports.

b. Private swimming pools and tennis courts provided such uses shall comply with the minimum required yard requirements for the principal building.

c. Outdoor barbecue structures.

d. Storage buildings.

e. Animal shelters to house domestic pets and livestock.

f. Farm storage buildings.

g. Day care and customary home occupations as defined in Section 16-4.2 and subject to standards and requirements of 16-5, as applicable.

16-9.4 Conditional Uses.

a. Public and private non profit school offering early childhood, elementary and/or secondary secular or religious education instruction and approved by the State of New Jersey, provided:

(1) The use is located on a lot of no less than ten acres in size and of 200 feet in width.

(2) No building shall be located within 75 feet of a lot line.

(3) No accessory use be located within 75 feet of a lot line.

(4) The use has direct access to a street classified as other than a local access street as shown in the adopted Master Plan of Warren Township.

(5) A planted buffer area of no less than 15 feet in depth or fencing or both shall be required between all parking areas, outdoor facilities and adjacent lot lines. This provision may be waived if natural topography, wetlands or other natural or man made features adequately separate parking areas from adjoining residentially zoned land.

b. Public auctions and flea markets. Such use may be permitted as an accessory use to a non-profit corporation or organization limited to fire companies, church and other places of worship, and Lions, Elks and further provided:

(1) The use is located on a lot of no less than six acres in size.

(2) A planted buffer area of no less than 15 feet in depth or fencing or both shall be required between all parking areas and adjacent lot lines. This provision may be waived if topography, wetlands or other natural or man made features adequately separate parking areas from adjacent residential zoned land.

(3) A license has been obtained as prescribed by the general ordinances of Warren Township.

c. Private membership recreational facilities and non-profit recreation facilities, including facilities open to the general public, offering activities limited to swimming, tennis, racket ball and handball courts, but not including commercial recreation uses wherein the principal use is an indoor activity

consisting of exercise rooms, court(s), pool(s), etc., provided:

(1) The use is located on a lot of no less than ten (10) acres in size.

(2) A planted buffer area of no less than 25 feet in depth or fencing or both shall be required between all parking areas, picnic areas, playing fields and buildings and the adjacent lot lines. This provision may be waived by the Planning Board if natural topography, wetlands or other natural or man made features adequately separate the above from adjoining residentially zoned land.

(3) No building shall be located within 100 feet of any lot line nor have a total floor area of more than ten percent of the lot area nor shall any building exceed two stories or 25 feet in height.

d. Nursing home, subject to and provided:

(1) The facility is licensed by the N.J. Department of Human Services.

(2) No structure is located less than 100 feet from a lot line.

(3) The facility complies with the Schedule of Area, Yard and Building Requirements for the EP-250 District.

(4) The use has direct access to a street classified as other than a local access street as shown in the adopted Master Plan of Warren Township.

16-9.5 Height, Area and Bulk Requirements.

As specified in the Schedule referenced in Section 16-8, except as hereinafter provided.

16-9.6 Permitted Modifications.

a. Variable Lot Size Provision. In a subdivision application, variable lot sizes may be approved by the

Planning Board. The lot sizes may be varied to the extent lots may have areas of not less than 40,000 square feet each and a width of not less than 125 feet if sufficient of the remainder of the lots are increased in area so that the average lot size will be not less than six acres. The Planning Board, in passing on such plats, shall consider the physical and structural characteristics including topography, floodplain, wetland and I-78 environmental impacts on the land comprised in the subdivision and determine that such variation in lot size will provide a superior layout of the subdivision and a better use of the land for building sites than would a uniform lot size. The subdivider shall submit a plat map showing the development according to the requirements of the EP-250 as shown in Section 16-8 and another plat map showing the development as modified in accordance with this subsection. In no event shall the density of development throughout the subdivision exceed the exact number of lots that would have been permitted to be built if such development had proceeded on the basis of six acres per lot with a width of 150 feet. Any lot created under modifications set forth above and which adjoins a R-65 Zone or developed lot in the EP-250 district shall provide a lot area of 65,340 square feet or equal to area of adjoining development lot, whichever the lesser but in no case less than 40,000 square feet.

b. Open Space Cluster Provision. In order to preserve and protect natural woodlands, waterways and further to provide open space area(s) to future residents concurrent with development, modification may be permitted. The lot area and minimum lot width, as required in the Schedule referenced in Section 16-8, may be reduced provided all of the following requirements are met.

(1) Each lot permitted under this subsection shall meet all of the following requirements:

(a) No less than six acres or 60% of the total

area of the tract shall be either dedicated to Warren Township or to a home owners association as per N.J.S.40:55D-43 as open space.

(b) The minimum lot area shall be 40,000 square feet.

(c) The minimum lot width of an interior lot shall be 125 feet.

(d) The minimum lot width of a corner lot shall be 125 feet.

(e) The yard and building requirements for lot(s) created by this subsection shall be the same as the R-65 zone as set forth in the Schedule referenced in Section 16-8.

(2) Plat map. The subdivider shall submit a plat map showing the development according to the requirements of the EP-250 District as provided in the Schedule referenced in Section 16-8 and another plat map showing the development as modified in accordance with this subsection. In no event shall the density of development throughout the subdivision exceed the exact number of lots that would have been permitted to be built if such development had proceeded on the basis of six acres per lot with a width of not less than 150 feet.

(3) Open space. When lands are proposed to be dedicated to the Township or home owners association, the Planning Board shall condition final approval upon acceptance of such land by the Township Committee or establishment of a homeowners association as the case may be. Open space may also be established through deed restricted conservation easement, or similar instrument, to Warren Township or similar instrument. All open space areas of the tract may be dedicated and conveyed by the owner to the Township for public use in fee simple subject to

acceptance by Township Committee.

(4) Application review. The Planning Board shall review the plat utilizing modified lot design standards and thereafter decide upon the submission. The Board shall base its decision upon the modified lot design plat proposal with regard to the following:

(a) Whether the proposal conforms to the comprehensive plan of the Township;

(b) Whether the proposal furthers the intent and spirit of the adopted Open Space Plan of the Township; and

(c) Whether the proposal does comply with the intent and purpose of the lot design provision as described.

The Planning Board shall not be compelled to approve a proposal for open space/cluster development if in its discretion the proposal does not further the orderly development of the area and the proposed open space does not relate to the comprehensive plan for development and provision of parks, conservation, preservation of natural features and natural drainage systems in the Township.

16-9.7 Off-Street Parking Requirements.

As specified in Section 16-24.

16-9.8 Sign Regulations.

As Specified in Section 16-25.

Supreme Court, U.S.
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DEC 13 2001
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No. 01-807

In the
Supreme Court of the United States

PHEASANT BRIDGE CORPORATION,

Petitioner,

v.

THE TOWNSHIP OF WARREN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER PHEASANT BRIDGE CORPORATION

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QUESTIONS PRESENTED

Where Petitioner successfully argued that the application of the zoning ordinance to its property did not bear a substantial relationship to its purposes, did the New Jersey Supreme Court err in holding that Petitioner was not entitled, under this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), to just compensation for the period during which the ordinance burdened its property?

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INTRODUCTION

Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the petition for certiorari filed by Petitioner Pheasant Bridge Corporation on October 26, 2001. All parties have consented to the filing of this brief.[1]

INTEREST OF AMICUS CURIAE

For more than 25 years, Amicus Pacific Legal Foundation (PLF) has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). And PLF has participated as amicus curiae in nearly every major real property takings case heard by this Court in the last two decades, including *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 121 S. Ct. 2589 (2001), a case now pending in the Court.

PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint on the issues presented in this case. Specifically, PLF argues that the New Jersey Supreme Court's decision conflicts with this

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[1] Letters evidencing the consent of all parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Court Rule 37.2(a).

In accordance with Rule 37.6, Amicus Curiae confirms that this brief was not written by counsel for any party in this matter and that no person or entity made a monetary contribution specifically for the preparation of this brief.

Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and with the decisions of a multitude of state and lower federal courts. In particular, PLF argues that it is constitutionally improper to deny compensation for a temporary taking when a regulation does not substantially advance legitimate state interests.

STATEMENT OF THE CASE

Petitioner is the owner of approximately 28.98 acres of vacant land in the Township of Warren. In December, 1993, the Township placed Petitioners' land within a newly created environmental protection zone (EP-250 zone) and thereby increased the minimum allowable lot size on the property from one and one half acres to six acres. Petitioners' land was so classified despite the fact that the environmental concerns giving rise to the EP-250 zone were not applicable to the property. At the same time, other similarly situated properties were permitted to remain under the previous zoning scheme.

Petitioners filed an action against the Township, asserting that the EP-250 zone was invalid as applied to their property and that it failed to substantially advance legitimate state interests, thereby effecting a taking of private property without just compensation. The trial court dismissed Petitioner's claim of invalidity and rejected the takings claim because Petitioner did not argue that the ordinance deprived it of all use of land. On appeal, the Appellate Division held that the trial court should have addressed the claim of invalidity and the takings claim under the substantial advancement test.

The trial court subsequently found that Petitioner had suffered a taking because the EP-250 zone failed to substantially advance a legitimate state interest as applied to Petitioner's land. The Appellate Division then reversed, concluding that takings law called for compensation only when a regulation denies a property owner substantially all economic use of property. It also reversed the trial court's judgment that the EP-250 zone was invalid as applied to Pheasant Bridge's property.

When the case came before the New Jersey Supreme Court, it agreed with the trial court that the EP-250 zoning was arbitrary and invalid as applied to Pheasant Bridge's property and therefore reversed this aspect of the Appellate Division's judgment. Indeed, the court concluded that application of the zoning scheme to Petitioner's land did not advance its underlying environmental purposes. However, it upheld the Appellate Division's dismissal of Petitioner's takings claim. This decision was based on the court's assertion that compensation is the proper remedy for a temporary regulatory taking only when a challenged regulation is valid and denies all economically beneficial use of property. The court also implicitly adopted the conclusion that a taking does not occur when a regulation does not substantially advance legitimate state interests. This ruling directly conflicts with the established precedent of this Court on a question of federal constitutional law.

SUMMARY OF ARGUMENT

This Court has stressed repeatedly that a regulatory taking occurs when a regulation does not substantially advance a legitimate state interest *or* when it denies an owner all

economically viable use. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992). It is also well-established that just compensation is the mandatory remedy for a regulatory taking. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987). The decision below contravenes both of these settled principles and thus perpetuates a conflict among lower state courts and between state and federal courts. It also arises as this Court prepares to settle a related conflict pertaining to the scope of *First English* in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 121 S. Ct. 2589. The Court should therefore grant the Petition, or in the alternative, grant and hold this matter pending the issuance of the Court's opinion in *Tahoe-Sierra Preservation Council.*

ARGUMENT

WHETHER A LANDOWNER IS ENTITLED TO COMPENSATION FOR THE EFFECTIVE PERIOD OF A TEMPORARY REGULATION THAT FAILS TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST IS AN IMPORTANT QUESTION OF TAKINGS LAW ON WHICH THE LOWER COURTS ARE IN CONFLICT WITH EACH OTHER AND WITH THIS COURT

Amicus will limit its discussion to a single critical issue, whether compensation is the constitutional remedy for the effective period of a regulation that fails to substantially

advance a legitimate state interest.[2] It has been over twenty years since this Court decided *Agins v. Tiburon*, and fourteen years since the decision in *First English*, but there is still no consensus among the lower courts on this important question. While some courts conclude, like the New Jersey court, that invalidation is the only relief available under such circumstances, others reason that compensation is required from the moment a regulation violates any substantive takings test. As a result, the jurisdiction matters greatly in any dispute over the applicability of the just compensation remedy. In some, a property owner will be reimbursed for shouldering the burdens of a restriction that is so irrational as to be declared illegal. In others, she will find that she is required to bear them alone.

I. The Decision Below Eviscerates the Doctrine of Temporary Takings

In *First English*, this Court held that "where the government's activities have already worked a taking of all use of property no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321. In so ruling,

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[2] Petitioner Pheasant Bridge Corp. also asks this Court to decide whether "a land use regulation that does not bear any real and substantial relationship to the ostensible purposes of zoning, as applied to a particular property, fails to substantially advance a legitimate state interest as to that property so as to require the payment of just compensation under the Takings Clause of the Fifth Amendment, without regard to the economic impact of the regulation."

Amicus believes it well-established that a taking occurs where a regulation fails to "substantially advance legitimate state interests" without respect to economic impact factors, *see Agins*, 447 U.S. at 260 (a zoning ordinance "effects a taking if the ordinance does not substantially advance legitimate state interests *or* denies an owner economically viable use of land"); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 704 (1999) (listing the numerous decisions of this Court that recognize the substantial advancement test as an independent standard of takings liability), and therefore chooses not to address this portion of the Petition for Certiorari.

the Court stressed that "invalidation" of an ordinance that constitutes a taking "is not a sufficient remedy to meet the demands of the Just Compensation Clause." *Id.* at 319. Rather, the self-executing character of that clause required compensation to be paid to the property owner aggrieved by a regulatory taking, regardless of whether the taking turned out to be of limited duration. The only exception was in the case of "normal delays in obtaining building permits, changes in zoning ordinances, variances and the like." *Id.* at 321.

Unfortunately, in some jurisdictions, courts have avoided the thrust of *First English*. In particular, when faced with a claim based on a deprivation of all use, a few courts expand the "normal delay" exception to deny the temporary takings remedy. *See Smith v. Town of Wolfeboro*, 615 A.2d 1252, 1258 (N.H. 1992) (stating "[t]he delay inherent in the statutory process of obtaining subdivision approval, including appeals to the superior court and to this court, is one of the incidents of ownership. Any decrease in the value of the subject property that occurs during the pendency of governmental decision making must be borne by the property owner"); *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188, 1203 (Cal. 1998) (concluding that "a judicial determination of the validity of certain preconditions to development is a normal part of the development process," and thus could not give rise to a right to a claim for compensation even when the "precondition" was invalid and denied all use during the judicial proceedings).

On the other hand, when the underlying claim is based on the substantial advancement standard, courts sometimes rule that the compensatory remedy is limited to cases involving a valid regulation that denies all use of property. *Miller & Son Paving, Inc. v. Plumstead Township*, 717 A.2d 483, 486 (Pa. 1998) (holding that an invalid regulation did not give rise to a temporary taking because it did not deny all use of property); *Chioffi v. City of Winooski*, 676 A.2d 786, 790 (Vt. 1996)

(improper denial of variance did not cause a taking because compensation remedy reserved for denials of all use); *Sea Cabins on the Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595, 604 (S.C. 2001) (stating that while a land owner "who successfully challenges the applicability of a governmental regulation is likely to have suffered some temporary harm during the process, the harm does not give rise to a constitutional taking").

The decision of the New Jersey Supreme Court adopts each of these rationales. In sum, the court below holds that *First English* does not apply if (1) there is any use of property left; (2) if the regulation is found to be invalid; or (3) if the claim for compensation relates to a period during which the regulation was being subjected to judicial challenge. It therefore leaves open the possibility of compensation for a temporary taking only where the government chooses to keep a regulation in place that (1) denies all use of property and (2) has been declared to constitute a taking in a judicial proceeding. This framework effectively reinstates the *Agins* rule, overturned in *First English*, that invalidation is a sufficient remedy for a temporary taking.[3] In practical terms, it requires individual

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[3] The decision below recalls *Agins* in its underlying reasoning as well as in its holding. For example, in *Agins*, the California Supreme Court observed:

> [T]he utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. "This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measure in favor of measures which are less stringent, more traditional, and fiscally safe."

Agins v. City of Tiburon, 598 P.2d 25, 30 (1979).

Similarly, in the decision below, the New Jersey Supreme Court stated:

(continued...)

landowners to internalize the immense costs (including loss of property value, litigation expenses, and lost profits) associated with all arbitrary and irrational attempts to advance public goals in the land use arena. This state of affairs cannot be squared with this Court's pronouncements or with the decisions of other jurisdictions.

II. The Decision Below Conflicts with the Decision of This Court in *First English* and with the Decisions of State and Federal Courts

A. The Decision Below Conflicts with *First English*

Because the plaintiffs in *First English* claimed a denial of all use of property, the compensatory principles set out in that case were framed in the context of that claim. But the compensatory remedy was not meant to be, and is not logically limited to, any particular takings test. As Justice Stevens acknowledged, the Court's decision in *First English* simply meant that "all ordinances which would constitute takings if allowed to remain in effect permanently, necessarily also constitute takings if they are in effect for only a limited period of time." *First English*, 482 U.S. at 322 (Stevens, J., dissenting). This principle was anticipated by Justice Brennan's

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[3] (...continued)
If such a distinction were accepted, it could have a chilling effect on land use planning for the adoption of an invalid ordinance could prove financially devastating to a municipality that was unsuccessful in its defense to a drawn-out constitutional challenge.

Appendix to Petition for Writ of Certiorari (Pet. App.) at 17.

dissenting opinion in *San Diego Gas & Electric Co. v. San Diego*, which stated that the government must "pay just compensation for the period commencing on the date the regulation first effected the 'taking' and ending on the date that the government entity chooses to rescind or otherwise amend the regulation." 450 U.S. 621, 653 (1981) (Brennan, J., dissenting). Therefore, since it is well-established that a taking results from a regulation that fails to advance a legitimate state interest, temporary takings should logically arise under the substantial advancement standard to the same degree that they flow from a denial of all use of property.[4] Further, the "normal delay" exception is similarly narrow in both contexts. Although Justice Stevens' dissenting opinion in *First English* suggested that it should encompass delay occasioned by resort to the judicial process, *see First English*, 482 U.S. at 334 (Stevens, J., dissenting), this proposition was soundly rejected by the majority. *See id.* at 319 (judicial invalidation of an excessive ordinance after a period of litigation "is not a sufficient remedy to meet the demands of the Just Compensation Clause"); *see*

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[4] This proposition is consistent with the Court's decision in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687. There, a jury found that the City of Monterey was liable for compensatory damages for a seven year period during which it repeatedly denied a landowner's application to build a residential development. 526 U.S. at 701. The jury reached its verdict after being instructed that it could find a taking if the city's action failed to substantially advance a legitimate state interest or denied all use of property. *Id.* at 701-02.

On appeal, the Court treated *Del Monte Dunes*' claim as a "a claim for a temporary regulatory taking." *Id.* at 704. It then stated that the jury's reliance on the substantial advancement standard was "consistent with our previous general discussions of regulatory takings liability" and affirmed that the City of Monterey could be held liable under that test for the period during which it refused to approve the residential development. *Id.* at 704-07. Though in dissent as to part of the Court's opinion, Justices Souter, O'Conner, Ginsburg and Breyer did not dispute the characterization of *Del Monte Dunes* claim as "temporary" or the application of the substantial advancement test to such a claim. *Id.* at 753 n.12 (Souter, J., dissenting).

also Eberle v. Dane County Board of Adjustment, 595 N.W.2d 730, 742 n.25 (Wis. 1999) (*First English* "clearly considered and rejected" the argument that "when an agency's erroneous action is reversed by a court, there is no taking, because such delay is just a part of the process of developing property").

The decision of the New Jersey Supreme Court cannot be reconciled with the principles articulated by this Court in *First English*. While the *First English* Court declared that "[i]nvalidation of the ordinance . . . is not a sufficient remedy to meet the demands of the Just Compensation Clause," *First English*, 482 U.S. at 319, the court below denied that a compensable taking occurs "as a result of the temporary application of a zoning ordinance that is ultimately declared invalid in a judicial challenge." Pet. App. at 14. While *First English* carefully limited the "normal delay" exception to certain administrative processes, the court below ruled that there is "no distinction justifying the need to provide for interim monetary damages" between the sort of delays contemplated by *First English* and for "delay occasioned by resort to judicial processes to challenge application of a zoning ordinance to one's property." Pet. App. at 16. Finally, while *First English* addressed the takings remedy generally, 482 U.S. at 310-12, the court below construed the compensatory remedy to apply only to those takings claims based on one standard; the "denial of all economically beneficial use" test. In light of these conflicts, it is incumbent upon this Court to grant the petition to clarify the scope of the compensatory remedy.

B. The Decision Below Conflicts with Important State Decisions

Given the conflict with *First English*, it is not surprising that the decision below also conflicts with the decisions of several state courts. The Nebraska Supreme Court has, for instance, clearly rejected the narrow temporary takings doctrine adopted below. *See Whitehead Oil Company v. City of Lincoln*,

515 N.W.2d 401 (Neb. 1994). In *Whitehead Oil*, the landowner successfully challenged the validity of a zoning ordinance that limited its property to office uses. 515 N.W.2d 390, 400 (Neb. 1994). The trial court then awarded damages for the five year period of litigation during which the ordinance remained in effect. *Whitehead Oil*, 515 N.W.2d at 404-05. On appeal, the city argued that there could be no compensable temporary taking under these circumstances, and thus that the damages were in error. *Id.* at 407. The Nebraska Supreme Court rejected this contention, concluding that the temporary takings doctrine established in *First English* was applicable to regulatory action that denied less than all use and, in particular, to cases where the regulation failed to substantially advance a legitimate state interest:

> Our determination . . . that in changing the applicable zoning designation the city acted not in furtherance of a legitimate state interest but arbitrarily and capriciously so as to deny Whitehead Oil a use permit, compels our agreement with the district court's ruling that Whitehead Oil's property has been subjected to a taking under the federal Constitution.

Id. at 408. It therefore upheld a damage award for the period during which the invalid zoning was in effect, calculated as the difference between the fair market value of the property as it existed under zoning allowing development of a convenience store and its value under the subsequent irrational zoning scheme. *Id.* at 411-12.

Michigan courts have similarly relied on this Court's jurisprudence in determining that compensation is required under the state constitution "for the period during which [a substantial advancement] taking was effective." *Poirier v. Grand Blanc Township*, 423 N.W.2d 351, 354 (Mich. 1988); *accord Schwartz v. City of Flint*, 395 N.W.2d 678, 687-88

(Mich. 1986). This rule operates without respect to whether the underlying regulation denies all use of property. Thus, in *Poirer*, the court granted compensation to a landowner whose land was (irrationally) zoned to permit residential uses but not a mobile home park. *Poirier*, 423 N.W.2d at 352, 355. In Arizona, the state's high court found Justice Brennan's dissenting opinion in *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 at 637-61 (Brennan, J., dissenting), instructive in holding that a landowner was entitled to compensation under the state constitution for the effective period of an ordinance that was invalidated because it placed some, but not all, of the claimant's property in a conservation zone. *Corrigan v. City of Scottsdale*, 720 P.2d 513, 515-18 (Ariz. 1986). Finally, a Texas appellate court recently held that compensation was due for a one year period during which a temporary building moratorium failed to advance legitimate state interests. *City of Glenn Heights v. Sheffield Development Company, Inc.*, 2001 Tex. App. LEXIS 7212, *52-53 (Ct. App. 2001).

The decision of the New Jersey Supreme Court is patently incompatible with the reasoning of these state courts. Unlike the decision below, these cases acknowledge that the violation of the substantial advancement takings test triggers the right to compensation at the time the violation occurs. *See, e.g., Whitehead Oil*, 515 N.W.2d at 411. They thus recognize that the compensatory remedy is a general remedy not dependent on a denial of all use of property or the "validity" of an ordinance at the time of enactment.[5] *Poirier*, 423 N.W.2d at 353 ("The

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[5] It is worth noting that, outside the "substantial advancement" context, several state courts have relied on the Court's jurisprudence for the general proposition that compensation is the remedy for the effective period of a zoning ordinance that is invalidated on takings grounds. *See Eberle v. Dane County Board of Adjustment*, 595 N.W.2d at 743 (requiring compensation for period during which an invalid zoning ordinance restricted access to

(continued...)

[First English] Court did not distinguish between takings accomplished by the use of police power or by eminent domain. The key consideration was whether there had been a taking."). In contrast, the court below ruled that compensation is required only when there is a prospective and complete denial of all use. In essence, the decision below establishes compensation as a constitutional rarity, one that is to be applied solely in the few cases where government is foolish enough to impose draconian restrictions in the face of judicial declarations that a taking is in the offing. This is not, and should not, be the norm in state courts.

C. The Decision Below Highlights a Conflict Among Federal Courts

The decision below highlights an ongoing conflict among the federal courts as to the remedy for a regulation that fails to substantially advance legitimate state interests. On the one hand, some federal courts hold that there is no right to just compensation for the effective period of a land use restriction that fails to substantially advance legitimate state interests unless it also severely impacts the value of property. *See Loveladies Harbor, Inc. v. United States,* 15 Cl. Ct. 381, 389-90 (Cl. Ct. 1988) (stating that, under the substantial advancement test, the "balancing of plaintiffs' private interests and the government's public interests reveals a private interest much more deserving of compensation," but ultimately holding that "this court cannot find a taking simply because there was no substantial advancement of a legitimate state interest"); *see also John E. Long, Inc. v. The Borough of Ringwood*, 61 F. Supp. 2d 273, 287 (D. N. J. 1998), *aff'd*, 213 F.3d 628 (3d Cir. 2000) (declaring that a "temporary taking that denies the landowner all

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[5] (...continued)
private property); *Rippley v. City of Lincoln*, 330 N.W.2d 505, 511 (1983) (compensation due for "period between the date the regulation took effect and the date it was rescinded").

use of his or her property . . . requires compensation for the time period of the taking").

On the other hand are federal courts that properly grant the compensatory remedy when a regulation is invalidated under the substantial advancement test. The Eleventh Circuit, for example, has explicitly endorsed the idea that there is a right to compensation during the effective period of an invalidated regulation. *See Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 (11th Cir. 1987); *see also Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 613 (11th Cir. 1997) (stating that if a regulation "goes so far in diminishing the landowner's interests as to constitute a taking, just compensation may be awarded running from the regulation's effective date"). In *Wheeler*, the City passed an ordinance that "outlawed construction of apartment complexes" throughout the city limits, including on plaintiff's land. *Wheeler*, 833 F.2d at 268. The district court found, and a panel of the Fifth Circuit subsequently agreed, that the city's actions "bore no substantial relationship to any legitimate police power interest," and therefore caused a taking. *Id.* The case was subsequently remanded to the district court for a determination of damages, but eventually returned to the newly-created Eleventh Circuit after the district court failed to properly award compensation for the period during which the invalidated ordinance was in effect. *Id.* at 269. At that point, the court of appeals reiterated that "the plaintiffs were entitled to compensation for the injury they sustained as a result of the temporary taking." *Id.* at 270. The court pointed to *First English* as vindicating its earlier conclusion that compensation was required for the effective period of an irrational ordinance. *Id.*

The Ninth Circuit has similarly determined that compensation is the remedy for an invalidated permanent confiscatory regulation. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000). In *Tahoe-Sierra*, the court of appeals considered

whether a temporary moratorium caused a taking. After reviewing *First English*, the court stated: "[A] *permanent* regulation leads to a *temporary* taking [requiring compensation] when a court invalidates the ordinance after the taking." *Id.* at 778 (italics in original; underline added). Thus, although the court (incorrectly) held that an intentionally temporary restriction could not rise to the level of a taking, its reasoning clearly implies that compensation is due for the period between enactment of a *permanent* regulation that violates the Court's takings standards and the judicial discovery of such a violation.

This Court has, of course, granted certiorari in *Tahoe-Sierra* to determine "[w]hether the Court of Appeals [for the Ninth Circuit] properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution." 121 S. Ct. 2589. Though it is fairly narrow, this question will require this Court to grapple with the scope of the temporary takings doctrine and may compel it to decide whether compensation is due from the moment a temporary or permanent regulation contravenes the Court's basic takings rules. As a result, *Tahoe-Sierra* implicates the fundamental issue underlying the decision below: Does implementation of a regulation that is infirm under a traditional takings test trigger the compensatory remedy?

As they now stand, the decisions of the Ninth and Eleventh Circuits cannot be reconciled with the decision below. The federal decisions hold that compensation must be paid for the effective period of a "permanent" regulation that is invalidated on takings grounds, while the court below holds that monetary relief is unavailable in these circumstances. Pet. App. at 14, 20. Neither of these positions represents a fully correct application of the temporary takings doctrine, which is best understood as applying the compensatory remedy to all regulations, whether temporary or permanent, that fail the Court's substantive takings tests. *See, e.g., City of Glenn*

Heights, 2001 Tex. App. LEXIS 7212 at *52-53 (compensation required for effective period of temporary moratorium that did not substantially advance legitimate state interests). Nevertheless, they aptly illustrate the confusion prevalent in the lower courts over the scope of the temporary takings remedy as articulated in *First English*.

In agreeing to review the Ninth Circuit's decision in *Tahoe-Sierra*, the Court has positioned itself to resolve this confusion. Thus, while the manifest conflict between the decision below and the decisions of other state and federal courts, not to mention *First English*, warrants an outright grant of review under Rules 10(b) and 10(c), it would be eminently appropriate for this Court to grant and hold the Petition until *Tahoe-Sierra* is decided, vacate the judgment below, and remand the case for further consideration in light of *Tahoe-Sierra*.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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No. 01-807

In The

Supreme Court of the United States

PHEASANT BRIDGE CORPORATION,

Petitioner,

v.

TOWNSHIP OF WARREN,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of the petitioners. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 205,000 builder and associate members throughout the United States, including more than 1500 members in the state of New Jersey. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedies available to its members under the U.S. Constitution and federal statutes, particularly when such remedies are in any way obstructed by a state court.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a number of cases involving the rights of property owners and the remedies available to them when their rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Comm'n*, 483

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

U.S. 825 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), and *Palazzolo v. Rhode Island*, 533 U.S. ---, 121 S.Ct. 2448 (2001).

SUMMARY OF ARGUMENT

There now exists a sharp split in the interpretation of this Court's opinion in *First English Evangelical Lutheran Church v. County of Los Angeles* - namely, whether the decision applies to ordinances later ruled invalid. At least two courts, the New Jersey Supreme Court and the U.S. Court of Appeals for the Ninth Circuit, have come to diametrically opposite positions on that point, creating legal confusion.

In addition, the court below based its decision, in part, on the impact a takings claim might have on a local government, rather than focusing on the impact a taking has on basic constitutional rights.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S DECISION IN *FIRST ENGLISH* HAS BEEN APPLIED IN DIAMETRICALLY OPPOSITE WAYS BY OTHER COURTS, CREATING CONFUSION AND CONSTITUTIONALLY SUSPECT OUTCOMES WHICH MUST BE CORRECTED

In finding that the Petitioner's takings claim was not worthy of legal review, the court below purported to analyze this Court's decision in *First English*. In that 'analysis,' the New Jersey Supreme Court determined that this Court's language led to but one clear and simple conclusion – *First English* did not apply to invalid ordinances.

After first declaring that a facial taking could not be established merely "as a result of the temporary application of a zoning ordinance that is ultimately declared invalid in a judicial challenge to the municipal zoning authority," *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 343 (N.J. 2001), the court below went further still. As the Petitioner's case addressed "an invalid ordinance in which government went beyond the scope of its zoning power, rather than a valid ordinance that effected a taking," – which was the case in *First English* – the legal principles developed by the U.S. Supreme Court could not be applied at all. *Id.* at 344.

The New Jersey Supreme Court buttressed its conclusion that *First English* did not apply to invalid ordinances by quoting from this Court's opinion itself. "The Takings Clause 'is designed not to limit the governmental interference with property rights per se but

rather to secure compensation in the event of otherwise proper interference amounting to a taking.' *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987)." *Id.* at 343.

Without dissecting the unique legal logic which led the New Jersey Supreme Court to remove from consideration as a taking any invalid, illegal or improper governmental action which impacts on property rights, we are left with one inescapable fact – this opinion interpreting *First English* is now the law of the land in the State of New Jersey.

Meanwhile, a continent away in California, the U.S. Court of Appeals for the Ninth Circuit has also interpreted *First English* – only this time reading the decision as applying *only* to ordinances which are later ruled invalid.

> The *First English* Court very carefully defined " 'temporary' regulatory takings [as] those regulatory takings which are ultimately invalidated by the courts." 482 U.S. at 310. What is "temporary," according to the Court's definition, is not the regulation; rather, what is "temporary" is the taking, which is rendered temporary only when an ordinance that effects a taking is struck down by a court. In other words, a permanent regulation leads to a "temporary " taking when a court invalidates the ordinance after the taking.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764, 778 (9th Cir. 2000), *pet. for reh'g and reh'g en banc denied*, 228

F.3d 998 (9th Cir. 2000), *cert. granted*, 121 U.S. 2589 (2001)

While this decision was met with derision in a sharply worded dissent on the petition for rehearing, it is the law not merely in California, but throughout the entire Ninth Circuit.

The legal conundrum is clear. The *First English* decision has been interpreted to apply *only* to invalidated ordinances on the West Coast, while in New Jersey, the very same decision now *never* applies to an invalidated ordinance. That other courts seem equally confused only adds to the need for immediate resolution of this legal crisis.[3]

Fortunately, this Court has already accepted the *Tahoe-Sierra* case for review, though limiting argument to the question of whether moratoria can constitute a taking. By accepting this case for review as well, this Court can further clarify the *First English* decision in the context of the jurisdictional split which now exists, and answer clearly the question at hand – whether an invalid governmental action, temporary as it may be, can lead to a temporary taking.

Such a question is far from academic, as both the New Jersey and Ninth Circuit opinions underscore. Confusion on the applicability of the *First English* temporary takings

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[3] *See, e.g., John E. Long v. Borough of Ringwood*, 61 F.Supp.2d 273 (D.N.J. 1998)(*First English* applies "even if the government authority later amends, withdraws, or invalidates the original regulation or action that caused the taking." *Id.* at 287); *Miller and Son Paving, Inc. v. Plumstead Township*, 717 A. 2d 483 (Penn. 1998)(*First English* does "not involve the invalidation of an unconstitutional zoning ordinance." *Id.* at 486).

doctrine to governmental actions – both valid and invalid alike – will lead to more decisions as far removed as those in New Jersey and the Ninth Circuit, with the primary victim being the Fifth Amendment protection of property rights.

II. IT IS THE IMPACT ON THE PROPERTY AS THE RESULT OF A TAKING, NOT THE IMPACT ON A GOVERNMENTAL ENTITY WHICH IS REQUIRED TO PAY JUST COMPENSATION, WHICH A COURT MUST CONSIDER IN A TAKINGS CLAIM

In reaching its decision to deny consideration of the Petitioner's takings claim, the New Jersey Supreme Court purported not only to rely on precedent, but also on practicality.

After arguing that property rights lost in an appeal of an invalid ordinance was no different than "regulatory delay in securing a change in, or variance from, a zoning ordinance," *Pheasant Bridge* at 344, the New Jersey Supreme Court went on to declare that holding a government liable for a taking for an invalidated ordinance was just plain dangerous.

To make a municipality pay just compensation in such circumstances "could have a chilling effect on land-use planning, for the adoption of an invalid ordinance could prove financially devastating to a municipality that was unsuccessful in its defense to a drawn-out constitutional challenge." *Id.*

That the New Jersey Supreme Court expressed such concern for governmental actors may be heart-warming to municipal associations everywhere, but it grossly misinterprets the proper role of a court in a takings analysis.

> The court's role "is not to make policy choices about the best ratio of regulation to individual rights, but to answer the question whether the public must pay for its regulations in this case. If those regulations take property the Constitution gives a simple answer: yes it must. The Founders chose to provide for just compensation, and this court must determine whether the Takings Clause is triggered by the facts before us.

Florida Rock Industries v. U.S., 45 Fed. Cl. 21, 24(1999)

Indeed, the very language of the *First English* decision – in a passage which was apparently missed by the New Jersey Supreme Court – notes that the protection of constitutional rights, not the impact on governmental action, is at the heart of a takings claim.

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just

> Compensation Clause of the Fifth Amendment is one of them.
> *First English*, 482 U.S. at 321.

Even were there not such a significant difference of interpretation between New Jersey and the Ninth Circuit regarding the application of *First English*, the New Jersey Supreme Court's misplaced sympathy for governments facing just compensation awards led it down a constitutionally suspect pathway all by itself. To base rejection of a takings claim, even in part, on the impacts an award would have on the entity responsible for the causing the taking in the first place is as legally indefensible as refusing to try an alleged criminal because the prosecutor though it would hurt her reputation.

The takings clause exists to protect citizens from an overreaching government, not the government from claims for just compensation, no matter how large. The New Jersey Supreme Court forgot this central element of our Constitution. This Court must remind its fellow jurists how the Fifth Amendment is meant to be read.

CONCLUSION

For the reasons above, the National Association of Home Builders urges this Court to grant Petitioner's Petition for Writ of Certiorari and to reverse the decision of the New Jersey Supreme Court.

DATED: December 28, 2001

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No. 01-807

IN THE SUPREME COURT OF THE UNITED STATES

PHEASANT BRIDGE CORP.,
Petitioner

v.

THE TOWNSHIP OF WARREN,
Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

RESPONDENT

Respondent Township of Warren is a municipal entity situated in Somerset County, New Jersey. The Township was formally established in 1806.

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BRIEF IN OPPOSITION TO

PETITION FOR CERTIORARI

Respondent Township of Warren respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Supreme Court of New Jersey.

◆

COUNTER-STATEMENT OF THE CASE

The Township of Warren is a municipality located in Somerset County, New Jersey. Its northern border is formed by the Passaic and Dead Rivers. Historically, the properties abutting the rivers were either vacant or utilized for agricultural purposes.

In New Jersey, zoning and land use powers are delegated to municipalities under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.. The Municipal Land Use Law is comprehensive, and requires each municipality to establish a Master Plan to guide the use of lands within the municipality. N.J.S.A. 40:55D-28. In 1988, the Warren Township Planning Board undertook the required re-examination of the Warren Township Master Plan pursuant to N.J.S.A. 40:55D-89. The new Master Plan, published and adopted in January

1990, had, among other things, a renewed focus on the recognition of environmental issues, conditions and problems which had become pronounced within the Township. (Pet App 30). The Master Plan undertook an evaluation to determine what areas of the Township were suitable for normal development, and which portions were not suitable for anything but lower density development. In that vein, the 1990 Master Plan recommended the establishment of an EP-250 zone in the northern tier of the Township coinciding with that section of the Township characterized by large lots which were primarily undeveloped or utilized for agricultural purposes. The tracts within the proposed zone were typically constrained by specified environmental factors, including open water, wetlands and wetlands buffers, steep slopes, flood plains, and a zero to one foot depth to seasonal high water table. The new zone would replace an existing zone which permitted, among other things, residential development based on a 1 ½ acre minimum lot size. Petitioner Pheasant Bridge owned a 28.9 acre undeveloped lot located within the proposed EP-250 zone. The property abutts the Passaic River and was subject to potential flooding. (Pet App 30). Petitioner had acquired the lot in 1986, and used it for production of hay. (Pet App 30). At no time during its period of ownership had Pheasant Bridge obtained any development approvals. In fact, Petitioner had,

prior to trial of the within matter, withdrawn its application to the New Jersey Department of Environmental Protection for a Wetlands Letter of Interpretation, a necessary prerequisite to any development on the site. Petitioner conceded at the trial level that a significant portion of the tract is consumed by wetlands, but it presented no evidence at trial to establish the extent or delineation of the wetlands on the site. (Pet App 87).

In October 1993, Respondent introduced Ordinance 93-24, the zoning ordinance substantially implementing the changes recommended by the adopted Master Plan. The proposed ordinance included the creation of the EP-250 zone, which was to consist of over 800 acres of land abutting the rivers. The introduction of the ordinance was published consistent with law. The Municipal Land Use Law contains a Protest provision by which a protest against any proposed amendment or revision of a zoning ordinance may be filed with the Municipal Clerk signed by the owners of 20 percent or more of the area within the proposed changed zone, or of the lots essentially abutting the zone. N.J.S.A. 40:55D-63. No protest was filed by Petitioner or any other property owners affected by the proposed creation of the EP-250 zone.

After public hearing, Ordinance 93-24 was adopted by the Warren Township Committee on December 2, 1993. The ordinance created the new EP-250 zone, which established a

minimum lot size of six acres. The permitted uses within the EP-250 zone included farming and single-family detached dwellings, the use for which the Pheasant Bridge property was being used at the time, as well as its intended use if Petitioner obtained development approval. Ordinance 93-24 did not, of course, only establish the EP-250 zone. The zoning ordinance was a comprehensive re-evaluation of land use planning within the Township, a proposition which was not disputed at the trial level. Consistent with the Master Plan, the ordinance established several new zones, including other residential zones having smaller lot size requirements.

After the passage of Ordinance 93-24, Petitioner filed an Action in Lieu of Prerogative Writs in the Superior Court of New Jersey, Law Division, Somerset County. There, Petitioner alleged that the provisions of the EP-250 zone were invalid facially and as applied, and constituted a taking as the regulations operated "to deprive the plaintiff of substantially all of its beneficial and economic use of its aforesaid lands". Respondent defers to the New Jersey Supreme Court Opinion for the essential procedural history of the Court action. However, it is significant that during the course of the trial, Petitioner conceded that it could not establish how many lots could actually be developed on the tract under the former one and a half acre zoning scheme. It also conceded that it could not establish the extent of

wetlands present on the tract, and had voluntarily withdrawn its application to the New Jersey Department of Environmental Protection for a delineation of the wetlands on the site. Consequently, the Petitioner did not prove any damages, or any actual diminution of value or use of the property, although it continued to assert a "theoretical" loss.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION OF THE NEW JERSEY SUPREME COURT IS COMPLETELY CONSONANT WITH THE DECISIONS OF THIS COURT, AND CORRECTLY FOUND NO TAKING OF THE PROPERTY HAD OCCURRED.

Petitioner contends that the New Jersey Supreme Court's decision is in conflict with Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138 (1980), and other United States Supreme Court cases. However, the decision is entirely consistent with current case law, and reached a result required by the facts of the case.

First, the New Jersey Supreme Court's decision necessarily took into account the specific facts of this case. It is clear that Petitioner did not and could not assert that it was deprived of substantially all use of its property after the passage of the ordinance. Ordinance 93-24 permitted Pheasant Bridge to develop its tract for residential uses, the same use which it purportedly wished to pursue under the former ordinance. Rather than depriving Petitioner of

the use of the property, the ordinance simply reduced the density at which the property could be developed for the desired use. In addition, Petitioner had not established the extent to which it could develop its property under the former ordinance It had not filed a Protest after the challenged ordinance was introduced, and there had been no administrative proceeding below by which the Township was made aware of the specific characteristics of Petitioner's tract which would have made the tract's exclusion from the EP-250 zone rational. Even after the ordinance was passed, Petitioner sought no review or relief from the governing body, but filed its Complaint in Superior Court of New Jersey.

The New Jersey Supreme Court found, essentially, the otherwise valid land use regulations established under the EP-250 zone did not rationally advance the ordinance's stated purpose when applied to the Petitioner's specific property. The Court therefore concluded that the zoning ordinance was arbitrary, capricious, and unreasonable as applied to the plaintiff's property only. The Petitioner was thus granted relief from the ordinance in the only forum in which Petitioner had sought that relief.

The New Jersey Supreme Court's conclusion that, under the facts of the case, Petitioner was not entitled to damages as a remedy for the "temporary taking" during the period between the adoption and the as applied invalidation of the EP-250 zone is completely consistent with Agins, *supra* and the other cases which Petitioner urges conflict with the New Jersey decision.

Petitioner repeatedly cites to the Agins principal that "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate State interests, see Nectow v. Cambridge, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928), or denies an owner economically viable use of his land, see Penn Central Transportation Company v. New York City, 438 U.S. 104, 138, N. 36, 98 S.Ct. 2646, 2666, 57 L.Ed. 2d 631 (1978)." There is nothing in the New Jersey Supreme Court Opinion which fails to comport with Agins. Agins involved a challenge to an ordinance enacted by the City of Tiburon, California, which placed the plaintiff's five acre tract in a zone restricted to one-family dwellings, accessory buildings and open space uses and prohibited construction until the owner submitted

development plans compatible with "adjoining patterns of development and open space". Agins, 447 U.S. at 257, 262. The density restrictions permitted the property owners to build between one and five single-family residences on their five acre tract. The plaintiffs there filed a Complaint against the City seeking damages for inverse condemnation and declarations that the zoning ordinances were facially unconstitutional. The gravamen of both claims was the plaintiffs' assertion that the City had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments.

This Court in Agins found that no taking had occurred under any theory advanced by the plaintiffs there. The Agins Court acknowledged that the ordinance did regulate and restrict the developability of the plaintiffs' property, although there was no physical invasion of the property by the City. The Agins Court articulated a balancing test between the private and public interests involved, and concluded that the ordinances satisfied the Constitutional requirements.

Although the New Jersey Supreme Court found Warren Township's ordinance to be arbitrary and capricious as applied to the plaintiff's property, that finding does not establish a compensable taking under the Agins test. In Agins, the plaintiffs had not submitted a plan for the development of the property, and therefore this Court found no concrete controversy regarding the application of the specific zoning provision. While the Court ultimately found that the ordinance in question did not work a taking of the property in question, it found that the plaintiffs' temporary inability to sell or develop their property during the later-abandoned condemnation proceeding instituted by the City also was not a taking as "mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership' which cannot be considered as a taking in the constitutional sense." Agins, *supra*, 447 U.S. at 263. [Fn. 9]. It was thus clear that the Agins decision correctly recognized that the course of normal land use regulatory activities may in fact result in temporary restrictions on a property owner's use of his property, which restrictions neither constitute a taking of the property, nor a deprivation of a recognized Constitutional right.

This holds particularly true in this case where the property owner sought no relief at any municipal level prior

to instituting the Court action. Consequently, there was no body of information available to the Township at that time to warrant the Pheasant Bridge tract's exclusion from the EP-250 zone which was specifically designed to address the large, undeveloped properties along the Passaic River which typically contained environmental constraints. As no taking would presumably occur had Petitioner filed for and subsequently obtained an exclusion or relief from the EP-250 zone regulation, it necessarily follows that no taking occurs when that relief is first sought and obtained in Court. For that reason, the New Jersey Supreme Court correctly concluded that "we see no distinction justifying the need to provide for interim monetary damages between regulatory delay in securing a change in, or variance from, a zoning ordinance and delay occasioned by resort to judicial process to challenge application of a zoning ordinance to one's property. (Citations omitted)." Pheasant Bridge, 169 N.J. at 298. (Pet App 16). That conclusion is supported by the entire body of case law cited by the Court. Thus, there is neither need nor basis for review of the New Jersey Supreme Court decision here.

II. THE NEW JERSEY SUPREME COURT DECISION DOES NOT CONFLICT WITH FIRST ENGLISH.

Petitioner also urges that the New Jersey Supreme Court decision somehow contravenes this Court's decision in First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed. 2d 250 (1987). That is nothing but wishful thinking. The facts of this case are so clearly distinguishable from those in First English that First English provides absolutely no support for Petitioner's position. First of all, in First English, the landowner alleged in its Complaint that the challenged ordinance had denied it "all use of its property" and the Supreme Court expressly limited its holding to such facts. 482 U.S. at 320. Quite obviously, the Pheasant Bridge situation was different, as Ordinance 93-24 simply reduced the number of lots which could presumably be developed following appropriate subdivision application. By contrast, the First English ordinance effectively denied the plaintiff the right to construct or reconstruct *any* building in an interim flood protection area after a flood destroyed that plaintiff's existing campground. In rejecting the California policy of refusing to provide any damages for temporary or regulatory takings, the United States Supreme Court in First English

held that the plaintiff landowner in that case could recover damages for the period before a land use regulation is finally determined to constitute a taking. However, the Court expressly limited its holding to the specific facts of the First English case. The Court declined to address "the quite different questions which would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like...". 482 U.S. at 321 (emphasis added). Therefore, this Court acknowledges that the normal course of municipal zoning, which necessarily includes periodic zoning changes, certainly does not automatically result in a "takings claim" whenever the zoning change impacts on the extent of the development of property, even if relief from the regulations is later obtained by the property owner.

First English certainly acknowledges that municipal governments simply cannot be held liable for damages of any kind due to a temporary heightened development regulation which is enacted during the course of establishing a valid land use regulatory scheme, even when the heightened regulation is thereafter found to be unreasonable as to a particular property. To hold otherwise would destroy any municipality's ability to zone on a district-wide basis, forcing the municipality to either inventory each tract within its borders before adopting any land use plan in order to avoid

potential financial ruin, or abandon any meaningful comprehensive zoning altogether.

Lastly, Petitioner contends that this case is "ripe" for adjudication by this Court. The issue of this case's ripeness is distinct from whether the Petitioner exhausted available administrative remedies so as to allow for a takings claim. See Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 192-93 (1985). Petitioner here had administrative remedies available from which relief could be obtained. The New Jersey Municipal Land Use Law contains a Protest provision which allows property owners to protest a change in a zoning ordinance. N.J.S.A. 40:55D-63. Even after the new zoning ordinance was passed, the Petitioner had a procedural right to petition the Warren Township Planning Board for a recommendation that the property be relieved from the regulations of the EP-250 zone. Feiler v. Fort Lee Board of Adjustment, 240 N.J. Super. 250, 256-57 (App. Div. 1990), certif. denied, 127 N.J. 325 (1991). By taking that route, Petitioner would have created a record at the municipal level by which the Township could either grant or deny the Petitioner's request for relief. That plaintiff here was permitted to seek relief from the EP-250 requirements in the Court system as a forum of first resort does not mean that the Petitioner's choice to so proceed does not affect its takings argument. The Petitioner here did not

provide Warren Township with the opportunity to issue a "final decision" required under Williamson, supra.. Under these facts and circumstances, the plaintiff's takings claim is defective. The New Jersey Supreme Court correctly found no basis for a takings claim.

CONCLUSION

The petition for writ of certiorari should be denied. The New Jersey Supreme Court's decision was based upon an accurate evaluation of the law in light of the specific facts of this case. The decision is consistent with Agins v. City of Tiburon, *supra*, and is not in conflict with any other decision of this Court. This case requires and deserves no further review.

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In the

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PHEASANT BRIDGE CORP.,

Petitioner,

v.

THE TOWNSHIP OF WARREN,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of New Jersey

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a land use regulation that does not bear any real and substantial relationship to the ostensible purposes of zoning, as applied to a particular property, fail to substantially advance a legitimate state interest as to that property and thus constitute a taking of that property so as to require the payment of just compensation under the Takings Clause of the Fifth Amendment, without regard to the economic impact of the regulation?
2. Is a property owner entitled to just compensation under the Takings Clause of the Fifth Amendment for a temporary taking of property between the enactment of a land use regulation and a subsequent judicial declaration that, as applied to such property, it fails to substantially advance legitimate state interests?

PARTIES TO THE PROCEEDINGS

Petitioner is a nongovernmental corporation. The corporate disclosure statement required by Rule 29.6 is contained in the Petition for Certification.

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STATUTES AND RULES

N.J.S.A. 40:55D-63 1

Rule 15.6 1

Rule 29.6 ii

Pheasant Bridge Corp. respectfully submits this brief pursuant to this Court's Rule 15.6 in reply to new matter contained in Respondent's Brief in Opposition.

A. THE LACK OF A FORMAL PROTEST AGAINST THE ADOPTION OF ORDINANCE 93-24 UNDER NEW JERSEY STATE LAW HAS NO BEARING UPON THIS MATTER.

Respondent's brief in opposition, without reference to the record, asserts that no protest against the adoption of Ordinance 93-24 pursuant to N.J.S.A. 40:55D-63 was filed and that the failure to pursue that "administrative" remedy renders the takings claim defective. Respondent, pp. 3, 14.[1]

That portion of N.J.S.A. 40:55D-63 which permits protests provides:

> A protest against any proposed amendment or revision of a zoning ordinance may be filed with the municipal clerk, signed by the owners of 20% or more of the area either (1) of the lots or land included in such proposed change, or (2) of the lots or land extending 200 feet in all directions therefrom inclusive of street space, whether within or without the municipality. Such amendment or revision shall not become effective following the filing of such protest except by the favorable vote of two-thirds of all the members of the governing body of the municipality.

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[1] Although respondent's statement is not supported by the record, petitioner acknowledges that it did not file such a protest and trusts that respondent will acknowledge that the vote which did adopt Ordinance 93-24 would have been sufficient to do so even if the protest were filed.

The opinion of the New Jersey Supreme Court notes that petitioner's property is 28.98 acres in area and that there are 778 "other" acres in the EP-250 zone. Pet. App. 2, 4. Thus petitioner's property constitutes less than $3^1/_3\%$ of the EP-250 zone and petitioner could not have filed an effective protest under that section.

Moreover, the protest provision merely enhances the majority required to support the adoption of legislation. Respondent does not explain how such an action could constitute an *administrative* remedy. Similarly, respondent suggests that petitioner could have petitioned respondent's planning board for relief from the regulations of the EP-250 zone.[2] Certainly petitioner could have asked the planning board to recommend that the governing body that the ordinance be amended (the planning board would have no authority itself to grant any relevant relief), but such relief would be in the form of legislation.

More fundamentally, respondent's argument on this point is muddled. Although respondent states that a ripeness inquiry under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), is distinct from the question of exhaustion of administrative remedies, respondent proceeds to argue that petitioner had administrative remedies in the form of the protest and request

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[2]For support of this proposition respondent cites *Feiler v. Fort Lee Bd. of Adjustment*, 240 N.J. Super. 250, 256-57 (App. Div. 1990), certif. denied 127 N.J. 325 (1991), but the connection between the proposition and the citation is obscure at best. In *Feiler* the municipality had adopted intentionally improper zoning for a tract in order to compel any developer to seek a "use" variance from the board of adjustment, a process by which the municipality could exert greater control over the development of the property. The *Feiler* court condemned such a scheme and stated: "The remedy for inappropriate zoning is legislative or judicial action." 240 N.J. Super. at 256.

for rezoning discussed above.[3] Respondent confuses *Williamson County*'s finality prong with the novel proposition that the government must be given an opportunity to "cure" the taking which would not be compensable until relief is refused by the legislature.[4]

B. *AGINS* NEITHER ARTICULATED A BALANCING TEST NOR INSULATED "TEMPORARY" PROPERTY RESTRICTIONS FROM A TAKINGS CLAIM.

Respondent characterizes this Court's opinion in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), as having articulated a balancing test between the private and public interests there involved. Respondent, p. 9. Respondent does not further identify this supposed balancing test or describe its application in this case. Although it is true that this Court stated that the question of when a property has been taken "requires a weighing of private and public interests," [447 U.S. at 261] the Court did not utilize that weighing process as the test for whether a taking had occurred. Rather, this Court determined that question based upon its earlier stated disjunctive test.[5] As it happened the ordinance in question did substantially advance legitimate governmental goals and because the California Supreme Court determined that the appellants there could develop their five acre property with as many as five houses, the ordinance did not facially deprive the

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[3]As noted in the Petition, the New Jersey courts ruled that petitioner had no administrative remedy to exhaust. Pet. 17, n. 5.

[4]In this case respondent's governing body had ample opportunity to afford petitioner relief from the EP-250 zone provisions of Ordinance 93-24 but has yet to do so.

[5]"The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land, ..." 447 U.S. at 260, citations omitted.

owners of economically viable use. Accordingly, that ordinance was found not to be a taking.

Respondent also cites *Agins* for the proposition that "the course of normal land use regulatory activities may in fact result in temporary restrictions on a property owner's use of his property, which restrictions neither constitute a taking of the property, nor a deprivation of a recognized Constitutional right." Respondent, p. 10. Neither text nor pagination are cited in support of this statement. The *Agins* case did not involve temporary restrictions. Given the context of the discussion in respondent's brief, it could be that the respondent is confusing the burdens associated with the pendency of a later abandoned condemnation process[6] with the burdens imposed by unreasonable regulations subsequently invalidated.

C. *FIRST ENGLISH* DOES NOT ESTABLISH MUNICIPAL IMMUNITY FOR TEMPORARY REGULATIONS IN THE COURSE OF ESTABLISHING A VALID LAND USE SCHEME.

Another extraordinary statement contained in respondent's brief is the claim that *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), established municipal immunity from takings claims arising from temporary regulations.

> *First English* certainly acknowledges that municipal governments simply cannot be held liable for damages of any kind due to a

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[6]As this Court's opinion relates, the City of Tiburon had commenced condemnation proceedings, which were abandoned the next year. The appellants were reimbursed for their costs in that action. *Agins*, 447 U.S. at 257-58, n. 1. That situation should be distinguished from petitioner's situation where the unreasonable regulation was applied for seven years.

> temporary heightened development regulation which is enacted during the course of establishing a valid land use regulatory scheme, even when the heightened regulation is thereafter found to be unreasonable as to a particular property.

[Respondent, p. 13.]

As with the so-called *Agins* balancing test discussed above, respondent cites neither text nor pagination for this proposition. This deficiency is not surprising as *First English* dealt specifically with an "interim" regulation and held that the takings claim could proceed.

Even if *First English* did provide such immunity, respondent has not demonstrated how that principle would apply in this case. The EP-250 zone was not a temporary regulation while a more permanent zoning ordinance was crafted but was itself the result of a multi-year planning process. Respondent, pp. 1-3.

CONCLUSION

The petition for writ of certiorari should be granted.

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